Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

MIKE MOORE, Attorney General of the State of Mississippi and ERIC CLARK, Secretary of State of the State of Mississippi,
Petitioners,

v.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an independently-sponsored, pre-election television advertisement that is entirely devoted to praising a candidate's qualifications for state elective office, and which contains a campaign slogan that sums up the advertisement's pitch for the candidate, is a form of "express electoral advocacy" under *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), and *Buckley v. Valeo*, 424 U.S. 1 (1976), so as to be properly subject to a state's election finance reporting and disclosure statute for independent expenditures.

LIST OF PARTIES

Parties to the proceedings are those as listed in the caption, to wit:

PETITIONERS:

Mike Moore, Attorney General of the State of Mississippi

Eric Clark, Secretary of State of the State of Mississippi

RESPONDENT:

Chamber of Commerce of the United States of America

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Proceedings and Disposition in Lower Courts	3
B. Facts	6
REASONS FOR GRANTING THE WRIT	8
I. THE ISSUE PRESENTED IS OF EXCEPTIONAL PUBLIC IMPORTANCE TO STATES WHICH HAVE *BUCKLEY*-BASED STATUTES REQUIRING REPORTING AND DISCLOSURE OF INDEPENDENT EXPENDITURES THAT ADVOCATE SUPPORT FOR A SPECIFIC CANDIDATE	10
II. THIS CASE IS AN APPROPRIATE COMPANION CASE FOR CONSIDERATION IN THE SAME TERM AND IN CONJUNCTION WITH EXPEDITED APPELLATE REVIEW BY THIS COURT IN THE CONSOLIDATED *McCONNELL* ACTIONS	15
III. ON THIS RECORD, THE FIFTH CIRCUIT'S DECISION DEPARTS FROM THE DECISION OF THIS COURT IN *MASSACHUSETTS CITIZENS FOR LIFE* AND IS INCONSISTENT WITH *BUCKLEY* ITSELF	17

TABLE OF CONTENTS—Continued

Page

IV. THE PETITION SHOULD ALSO BE GRANTED TO RESOLVE THE SPLIT BETWEEN THE CIRCUITS AND AMONG LOWER FEDERAL COURTS AND STATE COURTS 20

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

	Page
Buckley v. Valeo, 424 U.S. 1 (1976)	*passim*
Citizens for Responsible Government State Political Action Committee v. Davidson, 236 F.3d 1174 (10th Cir. 2000)	20
Elections Board of Wisconsin v. Wisconsin Manufacturers & Commerce, 597 N.W.2d 721, (Wisc.) *cert. denied*, 528 U.S. 969 (1999)	21
FEC v. Christian Action Network, 110 F.3d 1049 (4th Cir. 1997)	20
FEC v. Furgatch, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987)	10, 12, 21
FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986)	*passim*
FEC v. National Organization for Women, 713 F.Supp. 428 (D.D.C. 1989)	21
Iowa Right to Life Committee v. Williams, 187 F.3d 963 (8th Cir. 1999)	20
Maine Right to Life Committee v. FEC, 914 F.Supp. 8 (D.Me.), *aff'd*, 98 F.3d 1 (1st Cir. 1996)	20
Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 406 (Kennedy, J., dissenting)	13
Osterberg v. Peca, 12 S.W.3d 31 (Tex.), *cert. denied*, 528 U.S. 969 (2000)	21
State ex rel. Crumpton v. Keisling, 982 P.2d 3 (Or Ct. App. 1999), *review denied*, 994 P.2d 132 (2000)	21

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. 1	*passim*
U.S. Const. amend. 14	2

FEDERAL STATUTES

42 U.S.C. § 1983	2

TABLE OF AUTHORITIES—Continued

Page

Bipartisan Campaign Finance Reform Act of 2002, P.L. No. 107-155, 116 Stat. 81 .....9, 13, 15, 16
Section 201 16
Section 403(a) 16

MISSISSIPPI STATUTES

Miss. Code Ann. § 23-15-801(j) ..... *passim*
Miss. Code Ann. § 23-15-809 ..... *passim*

OTHER STATE STATUTES

California, West's Ann.Cal.Gov.Code § 82031 11
Delaware, 15 Del.C. § 8002(10) 11
Idaho, I.C. § 67-6602(g) 11
Iowa, I.C.A. § 56.13(1) 11
Kansas, K.S.A. § 25-4150 11
Maine, 21-A M.R.S.A. § 1019 11
Massachusetts, M.G.L.A. 55 § 18A 11
Minnesota, M.S.A. § 10A.01 Subd. 18 11
New Hampshire, N.H. Rev. Stat § 664:2(XI) 11
Nevada, N.R.S. 294A.004 11
North Carolina, N.C.G.S.A. § 163-278.14A 11
Pennsylvania, 25 P.S. § 3246(g) 11
South Carolina, Code 1976 § 8-13-1300(17) 11

OTHER MATERIALS

Annenberg Public Policy Center of the University of Pennsylvania, *Issue Advertising in the 1999-2000 Election Cycle*, http://www.appcpenn.org/political/issueads/1999-2000issueadvocacy.pdf 13
David L. Anstaett, *Express Advocacy and the Collision Between Political Speech and Electoral Integrity*, 2000 Wis.L.Rev. 1117 (2000)... 14

TABLE OF AUTHORITIES—Continued

	Page
Anthony Corrado, *On the Issue of Issue Advocacy*, 85 Va.L.Rev. 1803 (Nov. 1999)	5, 14
Richard L. Hansen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L.Rev. 265 (Dec. 2000)	15
http://www.law.stanford.edu/library/campaignfinance	15
Richard E. Levy, *Defining Express Advocacy for Purposes of Campaign Finance Reporting and Disclosure Laws*, 8 SPG Kan. J.L. & Pub. Pol'y 90 (Spring 1999)	4, 15
Glenn J. Moramarco, *Beyond "Magic Words": Using Self-Disclosure to Regulate Electioneering*, 49 Cath.U.L.Rev. 107 (Fall 1999)	4
Roy A. Schotland, *Financing Judicial Elections 2000: Change and Challenge*, 2001 L.Rev. M.S.U.-D.C.L. 849 (Fall 2001)	14
Thomas and Bowman, *Is Soft Money Here to Stay Under the "Magic Words" Test*, 10 Stan.L. & Pol'y Rev. 33 (Fall 1998)	14

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Mike Moore, Attorney General of Mississippi, and Eric Clark, Secretary of State of Mississippi, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals (App. A, 1a) is reported at 288 F.3d 187 (5th Cir. 2002).

The district court opinion (App. B, 19a) is reported at 191 F.Supp.2d 747 (S.D. Miss. 2000).

JURISDICTION

The judgment and opinion of the Court of Appeals reversing the district court and remanding for entry of judgment in favor of Respondent was entered on April 5, 2002. A timely Petition for Rehearing En Banc was filed by Petitioners in the Fifth Circuit. On May 28, 2002, the Fifth Circuit denied the Petition. App. D, 47a.

The jurisdiction of this Court is timely invoked by Petitioners pursuant to 28 U.S.C. § 1254(1). Respondent, plaintiff below, invoked federal question jurisdiction in the district court to review a complaint for declaratory judgment brought pursuant to 42 U.S.C. § 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. 1, which provides in part: "Congress shall make no law . . . abridging the freedom of speech. . . ."

U.S. Const. amend. 14, which provides in part that a state shall not "deprive any person of life, liberty, or property without due process of law. . . ."

Miss. Code Ann. § 23-15-801(j)(2001 rev.), of the state Election Code, reproduced in App. E, 49a, which defines an "independent expenditure" and provides:

> The term "independent expenditure" shall mean an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate or any authorized committee or agent of such candidate, and which is not made in concert with or at the request or suggestion of any candidate or any authorized committee or agent of such candidate.

Miss. Code Ann. 23-15-809 (2001 rev.), which requires the reporting and disclosure of certain information regarding "independent expenditures," is reproduced in App. F, 50a.

STATEMENT OF THE CASE

A. Proceedings and Disposition in the Lower Courts.

This is a case which warrants the Court's attention and consideration to determine whether independently-sponsored, pre-election, pro-candidate television advertisements constitute "express advocacy" in support of a clearly identified candidate under *Buckley v. Valeo*, so that expenditures for the ads are subject to state election finance disclosure statutes. This is a recurring issue of national importance to states, which are entitled to their own election finance reporting and disclosure requirements for state elections. No set of facts—undisputed in the lower courts—could more squarely and starkly frame the issue than those presented in this case. Under the Fifth Circuit's "narrow" interpretation of *Buckley*, 12a, no expenditure for any pro-candidate advertisement would ever be constitutionally subject to state disclosure laws if the ad omitted literal, "magic" words of exhortation or advocacy, such as "vote for Jones." At the same time, the Fifth Circuit, although asserting that its result is "compelled" by *Buckley*, further concedes that its conclusion is also "counterintuitive to a commonsense understanding of the message conveyed by the television political advertisements at issue." 17a. The Court should authoritatively resolve this dilemma, and this case presents the concrete set of facts upon which to do so.

In October 2000, immediately prior to the November 2000 general election in Mississippi, the Respondent Chamber of Commerce of the United States ("Chamber") expended over $400,000 to sponsor four frequently aired 30 second television advertisements, each of which favored an individual candidate (Prather, Smith, Cobb, or Starrett) for one of four contested positions on the Mississippi Supreme Court. See 51a-54a. Three of the candidates—Chief Justice Lenore Prather, Presiding Justice Jim Smith, and Justice Kay Cobb—were incumbents in their respective races, and Circuit Judge Keith Starrett was a challenger in his race.

In accord with *Buckley v. Valeo*, 424 U.S. 1, 79-82, (1976), Mississippi election finance laws, like those of a number of other states, require "independent expenditures" which expressly advocate the election of a clearly identified candidate to be reported and disclosed to the Secretary of State. Miss. Code Ann. §§ 23-15-801(j) (App. E, 49a), and 809 (App. F, 50a). There is no substantive dollar limit on the amount of "independent" expenditures, which are presumptively not coordinated with a candidate, but they must be reported. When Mississippi Attorney General Mike Moore refused to immediately agree after informal discussions with the Chamber's attorneys that expenditures for the candidate ads were not reportable, and while the ads continued to run and the matter was still being reviewed and researched by the Attorney General's Office, the Chamber on October 23, 2000, preemptively filed an action against Petitioners for an expedited declaratory judgment in the United States District Court for the Southern District of Mississippi.

The complaint sought, *inter alia*, a declaration that the four advertisements were totally unregulatable "issue ads" which did not "expressly advocate the election" of the four candidates. App. K, 55a. The Petitioners Attorney General and Secretary of State answered, asserting that expenditures for the ads were subject to reporting and disclosure. App. L, 65a. The Chamber argued that expenditures for the ads did not have to be reported and disclosed because the ads were "educational" and omitted "magic words" of election advocacy, such as "vote for" or "elect", mentioned by this Court as examples of express candidate advocacy in footnote 52 of *Buckley v. Valeo,* 424 U.S. at 44 n.52.[1]

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[1] The "magic" words are "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," or "reject." *See Buckley*, 424 U.S. at 44 n. 52; Glenn J. Moramarco, *Beyond "Magic Words": Using Self-Disclosure to Regulate Electioneering*, 49 Cath. U. L. Rev. 107 (1999); Richard E. Levy, *Defining Express Advocacy for*

On November 2, 2000, after an expedited hearing, briefing by the parties, and a review of videotapes of the Chamber's ads, the district court, Hon. Henry T. Wingate, District Judge, assessing the "essential nature" of the ads pursuant to *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), issued a detailed opinion. 191 F.Supp.2d. 747 (S.D. Miss. 2000) (App. B, 19a). The district court concluded, *inter alia*, that the "advertisements at issue which favor four specific candidates for the popularly elected Mississippi Supreme Court expressly advocate their elections," and that "no reasonable viewer would construe the advertisements otherwise." 42a-44a. Accordingly, the district court entered final judgment in favor of the Petitioners Attorney General and Secretary of State, holding that expenditures for the Chamber's ads were therefore subject to Mississippi's reporting and disclosure statute for independent expenditures. App. C, 45a.

On the Chamber's appeal, the Fifth Circuit panel (Circuit Judges Jolly and Parker, and District Judge Mills of the Central District of Illinois) reversed and remanded to the district court for entry of judgment in favor of Respondent Chamber. 288 F.2d 187 (5th Cir. 2002) (App. A, 1a). In the Fifth Circuit's view, the Chamber's ads did not contain "explicit words advocating the election of the featured candidates" or words "exhorting viewers to take specific electoral action during the elections," 13a, and therefore, the ads could not be the "express advocacy" in support of a candidate that it deemed required by *Buckley*. 17a. Under the Fifth Circuit's narrow view, the fact that the advertisements were run on election eve was "irrelevant." 15a. Accordingly, the Fifth Circuit held that the reporting and disclosure statute could not be constitutionally applied to the Chamber's ads under the First

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Purposes of Campaign Finance Reporting and Disclosure Laws, 8 SPG Kan. J. L. & Pub. Pol'y 90 (1999); Corrado, *On the Issue of Issue Advocacy*, 85 Va.L.Rev. 1803 (1999).

Amendment. A petition for rehearing en banc by the Fifth Circuit was denied, App. D, 47a, and this Petition follows.

B. Facts

The subsidiary facts as found by the district court are not in dispute. The printed audio-video scripts of the four television advertisements at issue are reproduced at App. G, 51a (Prather); App. H, 52a (Smith); App. I, 53a (Cobb) and App. J, 54a (Starrett), and the actual videotapes of the ads—viewed by the district court and essential to a meaningful review—are included as exhibits in the district court record. The audio/video script of the Chamber's ad regarding candidate Chief Justice Lenore Prather, 51a, reproduced verbatim below (but obviously lacking the visual effect of the actual ad), is typical of the other advertisements:

The Murphy Pintak Gautier Hudome Agency, Inc.

:30 Television
Date: October 10, 2000

Client: U.S. Chamber of Commerce
Title: "Chief Justice"
Spot #: USCC-1041

Video:	Audio:
Photo of gravel. Photo of Justice Prather begins as big blur and slowly comes into focus during spot.	Lenore Prather—Chief Justice of Mississippi's Supreme Court.
Font: Lenore Prather Chief Justice Common Sense Victims Rights	Lenore Prather—Using common sense principles to uphold the law.
Lenore Prather Independent First women Justice 35 years experience	Lenore Prather—Putting victims rights ahead of criminals and protecting our Supreme Court from the influence of special interests.
Justice Lenore Prather. A fair and independent voice	The first women appointed to Mississippi's Supreme Court. Lenore Prather has 35 years experience on the bench.
Learn more: www.litigation fairness.org	Lenore Prather. A fair and independent voice for Mississippi.
Paid for by U.S. Chamber of Commerce	

The district court in its opinion reviewed and analyzed each of the four ads and found that the thirty second commercials, aired at the very same time statewide judicial elections were being conducted, touted the background, qualifications, and judicial philosophy of the four identified Supreme Court candidates. 25a-27a; 42a-43a. The district court found that the commercials contained no true discussion of issues, provided only the background and experience of each favored candidate, repeatedly inserted the candidate names between qualification assertions, and concluded "with an emphatic phrase obviously designed to exhort support for the candidates' election to the Supreme Court." 42a. The text and audio of the ads ended with a campaign-like slogan, e.g. "Lenore Prather. A fair and independent voice for Mississippi" or "Justice Jim Smith - common sense on the bench." 51a-52a. The district court found that the "essential nature" of the ads was to "provide explicit directives to vote for the named candidates"; although the ads did not contain the express words "vote for the candidate," the district court found that "*no* reasonable viewer would construe the advertisements otherwise." (emphasis supplied). 42a. The district court observed that "magic words" become unnecessary "when an advertisement clearly champions the election of a particular candidate. . . ." 43a.

Moreover, the district court found that the Chamber's ads were "virtually the same" as the advertisements being aired by the candidates themselves at the same time, 43a, and noted that the ads also displayed a website which linked the viewer to web pages which exhorted support for the election of Justice Cobb and Judge Starrett. *Id.*

Finding the Chamber's ads to be "a plain, clever attempt to avoid the reach of Mississippi reporting and disclosure law", the district court concluded that the Chamber's ads favoring the four individual candidates for the Supreme Court

"expressly advocate their elections." 44a. Accordingly, as noted above, it found that reporting and disclosure requirements did apply.

The Fifth Circuit opinion does not dispute or find clearly erroneous any of the underlying facts found by the district court. Instead, in its view, a "bright-line" test was required and the only fact of consequence was the omission of an active verb such as "vote for" or "elect" from the Chamber's ads as a call to electoral action and express advocacy for the candidate. 17a. In the Fifth Circuit's view, even the television airing of the Chamber's ads immediately prior to the 2000 general election day—a date which is an objective fact and known to all—was "irrelevant." 15a.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case to address an issue of national importance to the substantial number of states which have election finance reporting and disclosure requirements for "independent" expenditures made in support of a candidate, to clarify what constitutes "express candidate advocacy" under *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) and *Buckley v. Valeo*, 424 U.S. 1 (1976), and to resolve an express split between the Circuits, and disagreement among lower federal and state courts, on this issue.

In *Buckley v. Valeo*, 424 U.S. 1, 82 (1976), this Court recognized that requiring the reporting and disclosure of independent expenditures in support of or against specific candidates "is a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic process of our . . . election system to public view." Under the unduly narrow and one sided view of the Fifth Circuit, however, the reporting and disclosure statutes of Mississippi and a number of other states will as a practical matter become essentially meaningless and empty letters—even in situations in which the "independent" ad is a virtual clone of a

candidate's *own* advertisement, as here. 43a. In its opinion, the Fifth Circuit itself acknowledges that its restrictive, "magic words" approach to candidate advocacy "undoubtedly allows individuals and organizations to circumvent electoral regulations" by simply omitting active verbs of exhortation such as "vote" or "elect" from their ads, 11a, and that the result here "may be counterintuitive to a commonsense understanding of the message conveyed by the television political advertisements at issue." 17a.

The Petitioners Attorney General and Secretary of State respectfully submit that this case satisfies every criteria set forth in Supreme Court Rule 10 for the granting of a petition for writ of certiorari. As discussed below, the election finance reporting issues presented here are of significant public importance not only to Mississippi but also to a number of other states which have statutes that require reporting and disclosure of "independent expenditures" modeled on the language and admonitions of *Buckley*. And while the precise issue here will in all likelihood persist for these states for state elections regardless of the ultimate fate of the new Bipartisan Campaign Reform Act of 2002, P.L. No. 107-155, 116 Stat. 81, because of certain definitional differences between the new federal act and *Buckley* based statutes, this case nevertheless presents an appropriate and important companion case for consideration on the merits by the Court in conjunction with its review of the BCRA litigation. That litigation will necessarily come before this Court from a three-judge district court for expedited appellate review during this same term.

Moreover, the narrow "magic words" approach of the Fifth Circuit to candidate advocacy, on this factual record the most restrictive of any Circuit, departs from a fair reading of this Court's decision in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986)("MCFL"), which is the only post-*Buckley* decision by this Court to review an actual

advertisement, and is inconsistent with footnote 52 of *Buckley* itself, which indicates that ads containing campaign-like slogans amount to "express advocacy."

Finally, as discussed further below, the Fifth Circuit's narrow and literal "magic words" approach to express candidate advocacy is the subject of a split in the Circuits, *see FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987), and disagreement between and among lower federal courts and state courts.

I. THE ISSUE PRESENTED IS OF EXCEPTIONAL PUBLIC IMPORTANCE TO STATES WHICH HAVE *BUCKLEY*-BASED STATUTES REQUIRING REPORTING AND DISCLOSURE OF INDEPENDENT EXPENDITURES THAT ADVOCATE SUPPORT FOR A SPECIFIC CANDIDATE.

It is beyond question that the central issue presented by this petition—whether third party expenditures for election eve television ads which feature only a specific candidate, tout his or her qualifications, contain a campaign-like slogan, and are virtual clones of the candidates' own ads, are "express advocacy" for the candidate, and thereby subject to disclosure, even though the ads omit some "magic words" of advocacy such as "vote for" or "elect" is of significant importance to Mississippi and a substantial number of other states with similar election finance laws for state elective races for judgeship and other offices. Does the First Amendment absolutely compel the result reached by the Court of Appeals?

More specifically, like that of a number of other states, Mississippi's reporting and disclosure statutes for "independent expenditures," Miss. Code Ann. § 23-15-801(j) and 809, 49a and 50a, are modeled directly from the language and

admonitions of this Court in *Buckley*, 424 U.S. at 60-82.[2] Under Mississippi's statute, and as permitted by *Buckley*, third parties who make expenditures over $200.00 that are not coordinated with an election campaign must publically report and disclose certain information to the Secretary of State if the expenditure is used for "expressly advocating the election or defeat of a clearly identified candidate. . . ." § 23-15-801(j); *see Buckley*, 424 U.S. at 80. In such circumstances, the organization or person making the third party expenditure must become accountable to the public by simply reporting and disclosing whether the expenditure amount was in support of or in opposition to the candidate, certifying whether or not the expenditure was made in cooperation with the candidate or candidate committee, and identifying the source of any contributions that are over $200.00 in amount with regard to the candidate ad expenditure. Miss. Code Ann. § 23-15-809(b), 50a. In accord with *Buckley*, there is no substantive dollar limitation on the amount of true "independent expenditures" that can be made, but they must be reported.

The Fifth Circuit's approach, unlike that of the district court, gives no weight whatsoever to the legitimate public and electoral interests served by the reporting requirements. Those legitimate interests are not something dreamed up to support Mississippi's statute or those of other states, but instead were defined by this Court itself in *Buckley* and other cases. The *Buckley* Court concluded that reporting and

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[2] These states include, for example, California, West's Ann.Cal.Gov. Code § 82031; Delaware, 15 Del.C. § 8002(10); Idaho, I.C. § 67-6602(g); Iowa, I.C.A. § 56.13(1); Kansas, K.S.A. § 25-4150; Maine, 21-A M.R.S.A. § 1019; Massachusetts, M.G.L.A. 55 § 18A; Minnesota, M.S.A. § 10A.01 Subd. 18; New Hampshire, N.H. Rev. Stat. § 664:2(XI); Nevada, N.R.S. 294A.004; North Carolina, N.C.G.S.A. § 163-278.14A; Pennsylvania, 25 P.S. § 3246(g); and South Carolina, Code 1976 § 8-13-1300(17).

disclosure requirements "directly serve substantial government interests" and are a constitutionally proper means to curb the "evils of campaign ignorance and corruption." 424 U.S. at 68-69. Independent expenditure disclosure requirements "shed the light of publicity on spending that is unambiguously campaign related." *Buckley*, 424 U.S. at 80. Similarly, because "independent expenditures" are not direct contributions to a campaign--and are not therefore subject to campaign contribution limitations--government has a substantial interest in requiring that these "otherwise [un]reported" independent expenditures be publicly disclosed. *Buckley*, 424 U.S. at 80; *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 265 (O'Connor, J., concurring). As *Buckley* expressed, disclosure of independent expenditures furthers First Amendment values "by opening the basic process of our...election system to public view." *Buckley*, 424 U.S. at 82. The "substantial" state interests furthered by disclosure of independent expenditures include informing the electorate of the sources and uses of money influencing candidates and voters; "deter[ing] actual corruption and avoid[ing] the appearance of corruption" through disclosure; and "gathering the data necessary to detect violations" of campaign laws, such as "coordinated" expenditures or actual contributions. *See Buckley*, 424 U.S. at 67, 80-81; *FEC v. Furgatch*, 807 F.2d 857, 862 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987). The disclosure of expenditures may also lessen the risk that individuals will spend money to support a candidate for future special treatment after the candidate is in office.

Under the auspices of the Fifth Circuit's decision, any organization, association, unincorporated entity, or individual may now pour unlimited election-eve expenditures into advertisements which in content and context plainly support the election of a particular judge or other candidate for state elective office and yet, by the not-so-clever expedient of omitting an active verb such as "elect," or "vote," from the ad, may totally avoid even the minimum public accountability

imposed by the reporting and disclosure statutes. The Fifth Circuit decision thus effectively opens and endorses a loophole that swallows the statute and submerges those legitimate state interests served by disclosure. If expenditures for the Mississippi Supreme Court candidate ads aired in this case do not have to be reported and disclosed, then the disclosure statutes have absolutely no teeth. Pursuant to the Fifth Circuit decision, no organization or individual desiring to influence the outcome of an election will ever be so unsophisticated as to include such "magic words" as "vote for" or "elect," in their pro-candidate ads, and instead "independent," unlimited expenditures for "clone" ads, not subject to candidate contribution limitations and not now even subject to reporting, will surely become the order of the day in state election races. If in fact *Buckley* absolutely compels the result reached in the Court of Appeals--and Petitioners do not believe that it does--then *Buckley* itself should be reexamined. *See Nixon v. Shrink Missouri Govt. PAC,* 528 U.S. 377, 406-410 (2000) (Kennedy, J., dissenting).

Moreover, it is no exaggeration to assert that this issue is an important subset of the ongoing national debate over the proper contours of election campaign finance reform, a controversy most recently evidenced in the federal sector in the passage of the Bipartisan Campaign Reform Act of 2002, P.L. No. 107-155, 116 Stat. 81. As the amount of money expended on candidate ads masquerading as "issue ads" not subject to reporting has skyrocketed over the past decade, the legitimate interests of the states and the "First Amendment values", *Buckley*, 424 U.S. at 82, that are furthered by the public disclosure of spending that is unambiguously candidate related have been ignored and undermined by virtue of decisions such as in this case. The Annenberg Public Policy Center of the University of Pennsylvania, for example, has reported a dramatic increase in expenditures for purported "issue ads" from the 1996 election cycle to the 2000 election cycle. *See Issue Advertising in the 1999-2000 Election Cycle,*

http://www.appcpenn.org/political/issueads/1999-2000issue advocacy.pdf. For 1996, the Center was able to track an estimated $135-150 million dollars of expenditures for purported "issue ads" prior to the 1996 elections; for 1998, the amount rose to $230-351 million dollars; and for the 2000 cycle, the number rose to an estimated $509 million dollars[3]. Significantly, as reported by the Annenberg study, 94% of the televised "issue ads" aired in the two months before the November 2000 elections made a case for or against a specific candidate--they were candidate centered ads. *Id.* at p. 14.

Commensurate with this recent and substantial escalation of expenditures for pre-election "issue ads," and the decisions of several lower federal courts, the issue presented here has over the past several years become an increasingly important topic for academic discussion and debate in law journals and reviews. *See, e.g.,* Thomas & Bowman, *Is Soft Money Here to Stay Under the "Magic Words" Test*, 10 Stan. L. & Pol'y Rev. 33 (Fall 1998) (noting that "one of the most important challenges confronting the current finance system is deciding what constitutes 'express advocacy'" and that a "strict magic words test is an inadequate standard"); Anthony Corrado, *On the Issue of Issue Advocacy*, 85 Va. L. Rev. 1803 (Nov. 1999) (asserting that narrow "magic words" distinction has "detrimental effects with respect to the accountability of the electoral system and the competence of the electorate"); Richard E. Levy, *Defining Express Advocacy for Purposes of Campaign Finance Reporting and Disclosure Laws*, 8-SPG Kan. J.L. & Pub. Pol'y 90 (Spring 1999); Glenn J.

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[3] This trend also holds true for state judicial elections. *See generally* Roy A. Schotland, *Financing Judicial Elections 2000: Change and Challenge*, 2001 L.Rev. M.S.U.—D.C.L. 849 (Fall 2001) (discussing 2000 state judicial election campaigns and noting that non candidate spending activity in such races was "not merely an increase but a change in kind", at n.58 and text).

Moramarco, *Beyond "Magic Words"; Using Self Disclosure to Regulate Electioneering*, 49 Cath. U.L. Rev. 107 (Fall 1999); David L. Anstaett, *Express Advocacy and the Collision Between Political Speech and Electoral Integrity*, 2000 Wis. L. Rev. 1117 (2000); Richard L. Hansen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. Rev. 265 (Dec. 2000).

The issue presented is an important one upon which the direct guidance of this Court is needed.

II. THIS CASE IS AN APPROPRIATE COMPANION CASE FOR CONSIDERATION IN THE SAME TERM AND IN CONJUNCTION WITH EXPEDITED APPELLATE REVIEW BY THIS COURT IN THE CONSOLIDATED *McCONNELL* ACTIONS.

The central issue presented in this case will in all likelihood persist for those states requiring disclosure of "independent expenditures" based on the language of *Buckley*, regardless of the ultimate outcome before this Court of the broader litigation challenges to the newly-enacted Bipartisan Campaign Reform Act of 2002 for federal elections, P.L. 107-155, 116 Stat. 81 ("BCRA").[4] The Bipartisan Campaign Reform Act contains a new requirement for disclosure of expenditures for federal election advertisements, called "electioneering communications," which is different from the *Buckley*-based standard of permitting reporting and disclosure of expenditures for non-coordinated ads that "expressly advocate the election or defeat of a clearly identified

[4] *See generally*, http://www.law.stanford.edu/library/campaignfinance (Stanford University website containing links with text of BCRA, legislative history, complaints and other docketing information for pending legal challenges to BCRA, and various articles).

candidate."[5] The consolidated district court challenges pending in *McConnell v. FEC*, Civ. No. 02-582 (CKK, KLH, RJL) (D.D.C.) necessarily present a broader array of issues for determination given the substantial changes to federal campaign finance law brought about by BCRA.

Nevertheless, although the issue presented here would clearly stand on its own regardless of other matters on the Court's docket, Petitioners respectfully submit that the instant matter is a particularly appropriate companion case for the Court to also consider on the merits in the same term of Court as its expedited appellate review of any three-judge court decision in *McConnell v. FEC*. Any comprehensive treatment of election finance issues in this term should include this case. The states have a right to define their election finance laws differently than Congress' approach in BCRA. Just as federal election regulators need guidance as to the validity of Congress' efforts at campaign finance reform in BCRA, the states similarly need guidance as to the permissible scope and application of their own reporting and disclosure statutes.

Oral argument before the three-judge court of the United States District Court for the District of Columbia in the consolidated actions in *McConnell* is scheduled for December 4, 2002, and Section 403(a) of BCRA provides for expedited review by appeal directly to this Court under shortened time

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[5] Under Section 201 of BCRA, an "electioneering communication" which must be reported and disclosed under certain circumstances means, *inter alia*, a broadcast which refers to a clearly identified candidate for federal office and is made within 60 days before a general election. Sec. 201(a). Section 201 of the Act further provides that if this principal definition is invalid, then an "electioneering communication" means a broadcast which supports or opposes the election or defeat of a candidate and which "is suggestive" of no plausible meaning other than an exhortation to vote for the candidate, regardless of whether the broadcast expressly advocates a vote for or against the candidate.

lines. The Act generally becomes effective on November 6, 2002. Given the similarity of the subject matter, and the importance of the campaign finance issues in each, the cases could be and should be considered on their merits at the same term of Court. Should this Court in a review of *McConnell* re-examine the approach of *Buckley* or change the parameters of the various holdings in *Buckley*, then this case should have the benefit of the Court's guidance. On the other hand, the fact-specific nature of this case may provide a practical, real world context that is beneficial to this Court's consideration of certain issues in the facial challenges in the *McConnell* actions. On its merits, this case presents a pressing constitutional question that is independent of those in *McConnell* but that may illuminate the related questions that will be presented in *McConnell*.

The writ should be granted for this additional reason.

III. ON THIS RECORD, THE FIFTH CIRCUIT'S DECISION DEPARTS FROM THE DECISION OF THIS COURT IN *MASSACHUSETTS CITIZENS FOR LIFE* AND IS INCONSISTENT WITH *BUCKLEY* ITSELF.

In reversing the district court, the Court of Appeals candidly admits that its result may be "counterintuitive." 17a. The Fifth Circuit purported to justify this anomalous result on the ground that its conclusion was "compelled" by the First Amendment and *Buckley* because the Chamber ads did not contain magic words such as "vote for" or "elect", exhorting viewers to take specific electoral action. *Id.* Petitioners submit that neither *Buckley* nor *MCFL* fairly compel the severe result reached by the Fifth Circuit. When considered in the context of a case in which the district court found, *inter alia*, that the Chamber's ads were virtually identical clones of the candidate's own positive campaign ads, where the ads were run immediately prior to the November 2000 general election date, where the content touted the candidates' qual-

ifications and philosophy, where the ads contained a campaign-like slogan, and where the district court also found that no reasonable person could have thought that the televised ads were anything other than supporting the election of the featured candidate, the Fifth Circuit decision is the most extreme application of the "magic words" test to date.

First, the Fifth Circuit's opinion is inconsistent with a fair reading of *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), relied upon by the district court. In this Court's only application of the *Buckley* Court's "express advocacy" phrase to an actual advertisement, *MCFL* indicates that the "magic words" contained in footnote 52 of *Buckley* should not be considered as exhaustive or definitive nor should they be interpreted to foreclose a common sense review of the "essential nature" of the advertisement. *MCFL*, 479 U.S. at 249.

Most importantly, and contrary to the Fifth Circuit's ruling, *MCFL* suggests that an advertisement can constitute express advocacy if its "*effect*" is to provide an explicit directive to vote for a candidate. *MCFL*, 479 U.S. at 250. The Fifth Circuit opinion requires an explicit directive, but *MCFL* only requires that the advertisement "*in effect*" supply the explicit directive to vote for the candidate. The two things are different. Moreover, under *MCFL*, this determination must be made based on the "essential nature" of the ad. *Id.* More specifically, *MCFL* reads in pertinent part as follows:

> "[t]he [newsletter] cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides *in effect* an explicit directive: vote for these (named) candidates. The fact that this message...is marginally less direct than "Vote for Smith' does not change its *essential nature*. [The newsletter] goes beyond issue discussion to express electoral advocacy."

479 U.S. at 249 (emphasis supplied). This is not, Petitioners submit, only the mere stuff of analysis by computer word

search, as the Court of Appeals would have it. Otherwise, this Court in *MCFL* would only had to have observed that the advertisement in fact contained the magic word "vote," without any further gloss or discussion of the "effect" or "essential nature" of the ad.[6]

Second, the Fifth Circuit decision is inconsistent with *Buckley* because the ads in question are the functional equivalent of certain "magic words" given as examples of "express advocacy" in footnote 52 of *Buckley,* 424 U.S. at 44 n. 52. Indeed, the effect of the Chamber ads is no different from the campaign slogan "Smith for Congress" or "support" listed by *Buckley* in footnote 52 as constituting examples of express candidate advocacy. The Prather ad, for example, specifies the candidate—Lenore Prather; specifies the office -- "Chief Justice of Mississippi's Supreme Court," and closes with a campaign slogan—"A fair and independent voice for Mississippi." The essential nature of this ad is plainly a functional equivalent to the campaign slogan "Smith for Congress," which constitutes "express advocacy" under *Buckley*, and with due respect it is only the unduly narrow approach of the Fifth Circuit, which refuses to give any weight to the legitimate interests of the states in reporting and disclosure requirements, which suggests otherwise. Review by this Court is warranted to correct the Fifth Circuit's departure from this Court's decisions and to clarify the proper standard to be applied in such cases.

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[6] The Court of Appeals further erroneously suggests that a review of advertisements to determine whether they discuss issues (which would be non-regulatable speech) or only endorse a candidate's qualifications would be an "impermissible" inquiry. 10a. On the contrary, under *MCFL*, a determination of whether an ad is indeed "issue discussion" or goes beyond that is a valid point of evaluation. *MCFL*, 479 U.S. at 249. Similarly, the panel errs by holding that the timing of dissemination of an ad—an objectively determinable fact—is "irrelevant" to this inquiry. 15a.

IV. THE PETITION SHOULD ALSO BE GRANTED TO RESOLVE THE SPLIT BETWEEN THE CIRCUITS AND AMONG LOWER FEDERAL COURTS AND STATE COURTS.

In addition, the Petition should be granted to resolve an express split between the Circuits and disagreement among lower federal courts and state courts regarding this issue. Both the district court here and the Fifth Circuit acknowledged this division. 32a; 7a-9a. Several Circuit Courts of Appeal, along with the Fifth Circuit, have adopted a narrow and restrictive "magic words" test, although none of those other courts have actually considered that approach when faced with third party sponsored, pro-candidate election eve television ads that tout a specific candidate's qualifications, contain campaign-like slogans, and are virtual clones of the candidates' own advertisements. *See FEC v. Christian Action Network*, 110 F.3d 1049, 1051-1052 (4th Cir. 1997) (express advocacy is restricted to communications that "literally include words which in and of themselves advocate the election or defeat of a candidate"); *Iowa Right to Life Comm. v. Williams*, 187 F.3d 963 (8th Cir. 1999); *Citizens for Responsible Govt. State Political Action Committee v. Davidson*, 236 F.3d 1174, 1187 (10th Cir. 2000) (communications which do not contain "express words" that advocate the election or defeat of a candidate are deemed "issue advocacy" which is constitutionally shielded from regulation); *Maine Right to Life Comm. v. FEC*, 914 F.Supp. 8 (D. Me.), *aff'd*, 98 F.3d 1 (1st Cir. 1996).

In contrast, and in addition to the district court here, other federal and state courts, mindful of the important governmental and public interests served by reporting and disclosure requirements as well as balancing important First Amendment considerations, have properly moved beyond an absolutist, mechanical word search and recognize that, consistent with *MCFL*, the clear effect of an election ad may

amount to express advocacy in support of a specifically identified candidate. The Fifth Circuit decision here explicitly rejects, 10a, and conflicts with, the rule in the Ninth Circuit. *See FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir.) (express advocacy standard is met if the advertisement, viewed "as a whole, and with limited reference to external events, is susceptible of no reasonable interpretation but as an exhortation to vote for or against a specific candidate"), *cert. denied*, 484 U.S. 850 (1987). The very same election eve advertisements at issue here, if televised in California or the other states of the Ninth Circuit, would plainly be subject to reporting and disclosure requirements as express advocacy in support of a clearly identified candidate. In the states of the Fifth Circuit, and the other Circuits utilizing a strict and literal "magic words" approach to candidate advocacy, however, even the minimum requirement of reporting and disclosure for expenditures for such ads is constitutionally impermissible.

Similarly, other lower federal courts and state courts are in disagreement with the rule adopted in the Fifth Circuit. *See FEC v. National Organization for Women*, 713 F.Supp. 428, 434 (D.D.C. 1989); *Elections Bd. of Wisconsin v. Wisconsin Manufacturers & Commerce*, 597 N.W.2d 721, 723-24, 731 (Wisc.) ("the definition of the term express advocacy is not limited to the specific list of 'magic words' such as 'vote for' or 'defeat' found in *Buckley* footnote 52"), *cert. denied*, 528 U.S. 969 (1999); *Osterberg v. Peca*, 12 S.W.3d 31, 53 (Tex.), *cert. denied*, 530 U.S. 1244 (2000); *State ex rel. Crumpton v. Keisling*, 982 P.2d 3, 10 (Or. Ct. App. 1999), *review denied*, 994 P.2d 132 (2000).

This Court's review is necessary to resolve the square conflict in circuit law and the disagreement in the lower federal and state courts.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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August 26, 2002

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

[April 5, 2002]

No. 00-60779

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

MIKE MOORE, Attorney General, State of Mississippi;
ERIC CLARK, Secretary of State, State of Mississippi,
Defendants-Appellees.

E. GRADY JOLLY, *Circuit Judge*:

This appeal of a declaratory judgment by the Chamber of Commerce of the United States of America involves the First Amendment and state regulation of political advertisements aired shortly before the election for members of the Mississippi Supreme Court. During the 2000 election season, the Chamber ran four television commercials describing the background and qualifications of candidates seeking positions on the court. The defendant state officials initiated a review of the advertisements to determine whether they were subject to a Mississippi statute that requires the disclosure of "independent expenditures" that "expressly advocate" the election or defeat of a specific candidate. In response, the Chamber sought a declaratory judgment that its advertisements were not subject to the disclosure law. The district court, in a thoughtful and reasoned opinion, held that the

advertisements were subject to state regulation because reasonable minds could not differ that the advertisements advocate the election of the specified candidates.

The Supreme Court has held that the First Amendment permits regulation of political advertisements, but only if they *expressly* advocate the election or defeat of a specific candidate. There is some disagreement, however, concerning the standard to be applied in determining whether a given advertisement contains "express advocacy." Today we follow most Courts of Appeal that have considered the issue. We hold that a state may regulate a political advertisement only if the advertisement advocates *in express terms* the election or defeat of a candidate. Applying this rule to the present case, we conclude that the Chamber's advertisements do not expressly advocate the election or defeat of a candidate. This is true because the advertisements do not contain explicit terms advocating specific electoral action by viewers. As a consequence, the advertisements are not subject to mandatory disclosure requirements for independent campaign expenditures. Accordingly, we reverse the judgment of the district court.

I

In November 2000, four of the nine positions on the Mississippi Supreme Court were up for election. Less than one month before the election, the Chamber ran four thirty-second television advertisements, each extolling the virtues of a different candidate running for a position on the court. The advertisements featured three incumbents (former Chief Justice Lenore Prather, Justice Kay Cobb, and Justice James Smith) and one challenger (Judge Keith Starrett). The advertisements identified the candidate and described in general terms the candidate's judicial philosophy, background, qualifications, and other positive qualities. For example, the advertisements emphasized the candidates' "common sense" and their interest in protecting "victims'

rights."[1] The advertisements concluded by displaying the address of an Internet web site, www.LitigationFairness.org, that contains a page with links to the campaign web sites of Justice Cobb and Judge Starrett and to pages containing biographical information for Justice Smith and former Chief Justice Prather.[2]

The election process for positions on the Mississippi Supreme Court is governed by Mississippi's election laws, which include regulations requiring reporting and disclosure of "independent expenditures" on candidates' campaigns. *See* Miss.Code. Ann. §§ 23-15-801 *et seq*. Because the Chamber did not report its expenditures on the advertisements to state election authorities, the Mississippi Attorney General and Secretary of State initiated an investigation to determine whether the advertisements violated the state election laws.[3] The Chamber brought an action in the District Court for the Southern District of Mississippi seeking declaratory relief from the application of the election regulations. The

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[1] The audio portion of the advertisement featuring former Chief Justice Prather is typical:

> Lenore Prather—Chief Justice of Mississippi's Supreme Court.
>
> Lenore Prather—Using common sense principles to uphold the law.
>
> Lenore Prather—Putting victims rights ahead of criminals and protecting our Supreme Court from the influence of special interests.
>
> The first woman appointed to Mississippi's Supreme Court, Lenore Prather has 35 years experience on the bench.
>
> Lenore Prather. A fair and independent voice for Mississippi.

[2] The link for Justice Smith directs the viewer to a page on the Litigation Fairness site describing Justice Smith's background. The link for former Chief Justice Prather directs the viewer to her biography on the Mississippi Supreme Court web site.

[3] The state acknowledges that there is no evidence that the Chamber colluded with any of the candidates in developing the advertisements.

Chamber argued that application of the state regulations to its advertisements would impermissibly curtail its right to free speech.

The district court adopted atest first articulated by the Ninth Circuit in *Fed. Election Comm'n v. Furgatch*, 807 F.2d 857 (9th Cir.1987). It held that the advertisements were "express advocacy" because, in the context of the ongoing election campaign, no reasonable viewer would construe the advertisements as anything but a directive to vote for the featured candidates—notwithstanding that the advertisements' express words did not call for action on the part of the voter. The district court specifically found that the advertisements "clearly champion[ ] the election of a particular candidate" and "contain no true discussion of issues." It thus held that the Chamber's advertisements could be subject to state campaign regulations without offending the First Amendment. The Chamber now appeals.

II

Because the Chamber's challenge to Mississippi's mandatory disclosure statute follows a well-worn path, we begin with a brief discussion of the applicable caselaw. Our review of the Supreme Court decisions in this area leads us to the conclusion that mandatory disclosure provisions like that in the Mississippi statute apply only to communications containing words that *explicitly* advocate the election or defeat of a particular candidate. Because the advertisements at issue here do not contain such express advocacy, we conclude that the First Amendment protects these advertisements from governmental regulation.

A

Although the states, like the federal government, have authority to regulate elections and election campaigns, the Supreme Court has held that the First Amendment constrains the government's power to compel the disclosure of independent contributions and expenditures, just as it con-

strains the government's power to regulate the amount of money that a person or group can contribute to or spend on election campaigns. *See Buckley v. Valeo*, 424 U.S. 1, 19, 60-61, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976).

In *Buckley*, candidates and political donors challenged the constitutionality of a federal election statute that imposed limits on individual campaign contributions, expenditures by candidates, and independent expenditures "relative to" specific candidates. Most relevant to our decision today, the Court also reviewed a provision of the statute requiring " '[e]very person (other than a political committee or candidate) who makes contributions or expenditures' aggregating over $100 in a calendar year 'other than by contribution to a political committee or candidate' to file a statement with the [Federal Election] Commission." *Buckley*, 424 U.S. at 74-75, 96 S.Ct. 612 (quoting 18 U.S.C. § 434(e) (1970 Supp. IV)). The Court observed that compelled disclosure of independent expenditures implicates the First Amendment because it "can seriously infringe on privacy of association and belief" and it can indirectly deter the exercise of First Amendment rights. *Id.* at 64-65, 96 S.Ct. 612. The Court recognized that the government has an important interest in providing the electorate with information about the sources of money spent during political campaigns and collecting data to enforce campaign laws. The Court nevertheless held that a provision requiring disclosure of independent campaign expenditures involves a "significant encroachment[ ] on First Amendment rights" and must therefore be subject to "exacting scrutiny." *Id.* at 64-67, 96 S.Ct. 612; *see also id.* at 75, 96 S.Ct. 612 ("In considering this provision [requiring disclosure of independent expenditures by individuals or groups], we must apply the same strict standard of scrutiny, for the right of associational privacy developed in *NAACP v. Alabama* [357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958)] derives from the rights of the organization's members to advocate their personal points of view in the most effective way.").

To ensure that the mandatory disclosure provision in the federal statute did not encroach on protected political speech by individuals and groups, the Court held that the provision *must be narrowly construed* to be consistent with the First Amendment. *Id.* at 80, 96 S.Ct. 612. Accordingly, the Court interpreted the provision to "apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." [4] *Id.* at 44, 96 S.Ct. 612. In a footnote, the Court then provided examples of terms of express advocacy: "'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n. 52, 96 S.Ct. 612.

In *Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 243, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) ("*MCFL*"), the Court applied the "express advocacy" standard to a newsletter that encouraged readers to "Vote Pro-Life" and listed the names of "pro-life" candidates in the election. Observing that the "express advocacy" standard is designed "to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons," the Court held that the newsletter contained "[j]ust such an exhortation." *Id.* The Court reasoned that an explicit directive to vote "pro-life" read in conjunction with named "pro-life" candidates was only "marginally less direct" than a specific exhortation to vote for the named candidates. *Id.* Thus, the *MCFL* Court extended the "express advocacy" inquiry to include consideration of the logical relationship between an express term advocating election or defeat and the names of specific candidates identified in the communication.

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[4] The Court articulated this standard in construing the section of the federal election statute limiting expenditures by individuals and groups "relative to a clearly identified candidate" to $1000 per calendar year. *Buckley*, 424 U.S. at 39, 96 S.Ct. 612. Later in its opinion, the Court adopted this standard during its review of the statute's mandatory disclosure provision. *See id.* at 77-80, 96 S.Ct. 612.

In reviewing the application and constitutionality of various state and federal election regulations, most Courts of Appeal have adopted the view that, under *Buckley* and *MCFL*, the government may regulate only those communications containing explicit words advocating the election or defeat of a particular candidate.[5] These courts rely primarily on *Buckley*'s emphasis on (1) the need for a bright-line rule demarcating the government's authority to regulate speech and (2) the need to ensure that regulation does not impinge on protected issue advocacy.[6]

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[5] *See Faucher v. Fed. Election Comm'n*, 928 F.2d 468, 470-71 (1st Cir.1991) ("Express advocacy is language which 'in express terms advocate[s] the election or defeat of a clearly identified candidate' through the use of such phrases as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' and 'reject.' " (quoting *Buckley*, 424 U.S. at 44 & n. 52, 96 S.Ct. 612)); *Fed. Election Comm'n v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir.1980) (en banc) (rejecting interpretation of federal election statute allowing FEC to regulate statements made "for the purpose, express or implied, of encouraging election or defeat"); *Fed. Election Comm'n v. Christian Action Network, Inc.*, 110 F.3d 1049, 1051 (4th Cir.1997) ("[T]he Federal Election Campaign Act [can] be applied consistently with the First Amendment only if it [is] limited to expenditures for communications that literally include words which in and of themselves advocate the election or defeat of a candidate."); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969 (8th Cir.1999) ("The Supreme Court's focus was on whether the communication contains 'express' or 'explicit' words of advocacy for the election or defeat of a candidate."); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1187 (10th Cir.2000) ("[C]ommunications that do not contain express words advocating the election or defeat of a particular candidate are deemed issue advocacy, which the First Amendment shields from regulation.").

[6] *See, e.g., Christian Action Network*, 110 F.3d at 1051 (noting that the *Buckley* Court "opted for the clear, categorical limitation, that only expenditures for communications using explicit words of candidate advocacy are prohibited, so that citizen participants in the political processes would not have their core First Amendment rights to political

The sole departure from this bright-line approach among our sister circuits came in *Fed. Election Comm'n v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied,* 484 U.S. 850, 108 S.Ct. 151, 98 L.Ed.2d 106 (1987).[7] The Ninth Circuit summarized its holding in that case:

> We conclude that speech need not include any of the words listed in Buckley to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.

Id. at 864. The court further elaborated:

> First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is unmistakable and unambiguous,

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speech burdened by apprehensions that their advocacy of issues might later be interpreted by the government as, instead, advocacy of election result"); *Citizens for Responsible Gov't*, 236 F.3d at 1187 ("In order to counter the tendency of the line between protected 'issue advocacy' and regulable 'express advocacy' to 'dissolve in practical application,' the *Buckley* Court construed the allegedly vague statute at issue as applicable only 'to communications containing express words of advocacy of election or defeat' " (quoting *Buckley*, 424 U.S. at 44 & n. 52, 96 S.Ct. 612)); *Iowa Right to Life Comm.*, 187 F.3d at 969 ("To avoid uncertainty . . . the Supreme Court in *Buckley*, established a bright-line test. . . .").

[7] One district court and several state courts have also applied this approach. *See, e.g., Elections Bd. of State of Wis. v. Wisconsin Mfrs. & Commerce*, 227 Wis.2d 650, 597 N.W.2d 721, 732 (1999); *Osterberg v. Peca*, 12 S.W.3d 31, 53 (Tex.2000); *Federal Election Comm'n v. Nat'l Organization for Women*, 713 F.Supp. 428, 433 (D.D.C.1989); *cf. Federal Election Comm'n v. Christian Coalition*, 52 F.Supp.2d 45, 63-64 (D.D.C.1999) (holding that "[a]lthough the implicit message is unmistakable, in explicit terms [a statement in a fundraising letter] is prophecy rather than advocacy" and that a "scorecard" was not express advocacy because "a reasonable person could understand [the] statement to be a directive to engage in issue advocacy").

> suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action.

Id.[8] Although the Ninth Circuit's approach does not stray far from other articulations of the "express advocacy" standard, it does introduce two elements not present in the limited inquiry endorsed by the other circuits: (1) "limited reference" to the context of the communication and (2) reference to whether "reasonable minds" could differ about the meaning of the communication.

These aspects of the Ninth Circuit's approach in *Furgatch* were essentially rejected by courts that adopted the bright-line rule requiring explicit words directing viewers to vote for or against a particular candidate. For example, in *Virginia Society for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d 379, 392 (4th Cir.2001), the Fourth Circuit found a federal regulation unconstitutionally overbroad because it defined express advocacy as a communication that, when taken as a whole, " 'could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s).'" The court held that "[t]he regulation goes too far because it shifts the

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[8] The *Furgatch* Court applied this analysis to a newspaper advertisement against then-President Jimmy Carter urging readers "Don't let him do it." The court concluded that the advertisement was express advocacy when read in context because "reasonable minds could not dispute that [the] advertisement urged readers to vote against Jimmy Carter." *Furgatch*, 807 F.2d at 864.

determination of what is 'express advocacy' away from the words 'in and of themselves' to 'the unpredictability of audience interpretation.'" *Id.* at 392. The Eighth Circuit reached a similar conclusion when it found that an election regulation defining express advocacy according to "what reasonable people or reasonable minds would understand by the communication" was unconstitutional because the regulation "does not require express words of advocacy." *Iowa Right to Life*, 187 F.3d at 969.

We agree that the *Furgatch* test is too vague and reaches too broad an array of speech to be consistent with the First Amendment as interpreted in *Buckley* and *MCFL*.[9] Instead, we iterate that the language of the communication must, by its express terms, exhort the viewer to take a specific electoral action for or against a particular candidate. *See Buckley*, 424 U.S. at 44, 96 S.Ct. 612 (interpreting federal election statute to "apply only to expenditures for communications that *in express terms* advocate the election or defeat of a clearly identified candidate" (emphasis added)). Although application of this rule may require making straightforward connections between identified candidates and an express term advocating electoral action (as in *MCFL*), the focus must remain on the plain meaning of the words themselves.

We must admit, as the *Furgatch* Court correctly observed, that this narrow interpretation of "express advocacy"

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[9] We also reject amici's definition of express advocacy: "[W]hen an ad contains *only* an express endorsement of a candidate's qualifications for public office . . . and contains *no* discussion of any issue as a topic worthy of its own attention, then the ad is an 'electoral' rather than 'issue' ad." This definition involves an impermissible inquiry into what issues are "worthy" topics of discussion. We also note that neither *Buckley* nor *MCFL* adopted an "express endorsement" test. Indeed, such a test necessarily would encompass communications that contain no "express terms advocat[ing] the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 44, 96 S.Ct. 612.

undoubtedly allows individuals and organizations to circumvent electoral regulations simply by omitting from their communications the genre of words and phrases that convey the same meaning as the words listed in *Buckley*. This observation, however, does not affect our reading of *Buckley*. Indeed, the *Buckley* Court recognized, for example, that confining the federal limitation on expenditures in this manner "undermines the limitation's effectiveness as a loophole-closing provision by facilitating circumvention by those seeking to exert improper influence upon a candidate or office-holder." *Buckley*, 424 U.S. at 45, 96 S.Ct. 612. The Court's overriding concern, however, was that a statute with an ambiguous scope would chill political discourse:

> "[T]he supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."

Id. at 43, 96 S.Ct. 612 (quoting *Thomas v. Collins*, 323 U.S. 516, 535, 65 S.Ct. 315, 89 L.Ed. 430 (1945)). To avoid this result, the Court emphasized the need for a clear line between regulated and unregulated speech under the statute. The Court adopted an "express advocacy" standard focusing on the explicit language of the communication because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id.* at 42, 96 S.Ct. 612.[10]

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[10] *See also Iowa Right to Life*, 187 F.3d at 969 (recognizing the State's concern "that persons or organizations will surreptitiously advocate the election or defeat of a named candidate but avoid legitimate government

In sum, we believe that a narrow interpretation of "express advocacy" is faithful to the language and spirit of *Buckley* and *MCFL*. It clearly avoids the pitfalls of making application of the First Amendment dependent on the understanding of the reasonable person under the circumstances.[11] Accordingly, we hold that a communication constitutes "express advocacy"—and may therefore be subject to mandatory disclosure regulations—only if it contains explicit words advocating the election or defeat of a clearly identified candidate.

B

We now turn to apply these principles to this case. The Mississippi election statute at issue here provides that each person who makes aggregate "independent expenditures" of more than $200 during a calendar year must file a report with the state disclosing the amount and source of the expenditure and a statement that the expenditure was not made in cooperation with a candidate. *See* Miss.Code Ann. § 23-15-809. "Independent expenditures" are defined in the statute as "expenditure[s] by a person expressly advocating the election or defeat of a clearly identified candidate which [are] made without cooperation or consultation with any candidate or any authorized committee or agent of such candidate." Miss.Code Ann. § 23-15-801(j). Because the

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regulation and reprisal by simply omitting 'magic words' of advocacy" but concluding that a bright-line test is required to avoid chilling free speech).

[11] The present case provides a good example of such pitfalls. In order to find that the advertisements here were subject to state regulation, the district court had to draw a distinction between the content of the advertisements and the court's view—as thoughtful as it may be—of "true issue advocacy." *Chamber of Commerce v. Moore*, 191 F.Supp.2d 747, 761 (S.D.Miss.2000); *see also Furgatch*, 807 F.2d at 864 (concluding that an advertisement was not "issue-oriented speech" because it "directly attacks a candidate, not because of any stand on the issues of the election, but for his personal qualities and alleged improprieties in the handling of his campaign").

Mississippi legislature essentially adopted the language of the Supreme Court's decisions in *Buckley* and *MCFL* in drafting this statute, all that remains is to determine whether the Chamber's advertisements constitute "express advocacy" under the standard articulated above.

There is no question that the Chamber's advertisements do not contain any of the phrases that *Buckley* cites as examples of "express advocacy." Nor do the advertisements contain other explicit words advocating the election of the featured candidates or exhorting viewers to take specific electoral action during the elections. Indeed, the advertisements do not refer at all to the impending elections.

Amici nevertheless argue that the Chamber's advertisements are express advocacy because their "express content, when considered as a whole, unambiguously constitutes an endorsement of a particular candidate for public office." Observing that neither *Buckley* nor *MCFL* requires "succinct advocacy," amici argue that the advertisements' references to positive attributes of specific candidates are sufficient to bring the advertisements within the scope of the statute—despite the absence of explicit words directing viewers to take a specific action.[12] The State and amici also point out that the advertisements presented only favorable information about the candidates. Because the "essential nature" of each advertisement is an endorsement of the named candidate, amici contend that the advertisements may be subjected to disclosure requirements without offending the First Amendment.

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[12] Amici also argue that the advertisements must be express advocacy because they do not meaningfully discuss public issues and thus cannot be considered issue advocacy. This argument incorrectly assumes that express advocacy is defined as the absence of issue advocacy. As explained above, the nature of the language in the communication—that is, the presence or absence of explicit words advocating the election or defeat of a specific candidate--determines whether it constitutes issue advocacy or express advocacy.

We think it is clear that the examples of express advocacy listed in the *Buckley* footnote are illustrative rather than exhaustive because there are a variety of other words and phrases that convey precisely the same meaning.[13] But *express* advocacy necessarily requires the use of language that explicitly and by its own terms advocates the election or defeat of a candidate. If the language of the communication contains no such call to action, the communication cannot be "express advocacy." Thus, communications that discuss in glowing terms the record and philosophy of specific candidates, like the advertisements at issue here, do not constitute express advocacy under *Buckley* and *MCFL* unless they also contain words that exhort viewers to take specific electoral action for or against the candidates. *Cf. Clifton v. Fed. Election Comm'n*, 114 F.3d 1309, 1311 (1st Cir.1997) ("[A]s glossed by the Supreme Court to avoid 'overbreadth' [in *MCFL*], the [federal election] statute does not prevent corporations and unions from engaging in issue advocacy including publication of the records and positions of federal election candidates.").

The state emphasizes that the Chamber's advertisements aired on the eve of the elections for the supreme court and were virtually identical to the candidates' own advertisements—except that they omitted the phrase "vote for [the featured candidate]," which appeared at the end of the candidates' advertisements. The state contends that these facts, viewed together with the content of the Chamber's advertisements, supports its position that the advertisements

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[13] *Cf. Christian Coalition*, 52 F.Supp.2d at 65 ("While the 'express advocacy' standard is susceptible of circumvention by all manner of linguistic artifice, merely changing the verb 'vote' into the noun, 'trip to the voting booth' is insufficient to escape the limited reach of 'express advocacy.'"); *Furgatch*, 807 F.2d at 863 (noting that the phrases listed in *Buckley* "do[ ] not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate").

constitute express advocacy. Indeed, amici argue that the advertisements "make no sense except in the context of an election campaign." We do not necessarily gainsay this observation.

As the above discussion makes clear, however, these contextual factors are irrelevant to our determination whether the advertisements contain express advocacy. The Court in *MCFL* did not rely on the factual context in which the communication was made in determining whether it contained express advocacy.[14] Instead, it held that courts reviewing a communication may consider the logical relationship between an *express term* advocating specific electoral action and the names of candidates clearly identified in the communication. We therefore do not believe that *MCFL* retreated from the requirement that express advocacy must contain explicit words advocating electoral action. *See MCFL*, 479 U.S. at 249, 107 S.Ct. 616 (noting that *Buckley* concluded that "a finding of 'express advocacy' dependedupon the use of language such as 'vote for,' 'elect,' 'support,' etc."). In any event, even under the test articulated in *Furgatch*, the timing of the advertisements (or other contextual factors) cannot transform general informational statements about candidates into a call for specific electoral action. *See Furgatch*, 807 F.2d at 864 ("[S]peech may only be termed 'advocacy' if it presents a clear plea for action, and thus speech thatis merely informative is not covered by the Act."); *see also id.* at 863 ("Context remains a consideration, an ancillary one, peripheral to the words themselves.").

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[14] The state suggests that the *MCFL* Court took timing into account in its review of the "Special Edition" newsletter at issue in that case. While the Court did observe that the special edition was released to coincide with an election and had a higher circulation than normal editions of the newsletter, the Court did not rely on these facts in concluding that the newsletter contained express advocacy. *See MCFL*, 479 U.S. at 249- 50, 107 S.Ct. 616.

Amici also suggest that statements in the advertisements like "Lenore Prather—A fair and independent voice for Mississippi" are only "marginally less direct" than "Smith for Congress," which is listed among the examples of express advocacy in *Buckley*. Because neither phrase includes a verb like "vote" or "elect," amici reason that both phrases depend on their context to convey meaning. We find this argument unpersuasive because the two phrases are not synonymous: The first connects a name to a positive character trait while the second connects a name to an elected office. As we noted above, favorable statements about a candidate do not constitute express advocacy, even if the statements amount to an endorsement of the candidate.[15] Even assuming that the phrases were roughly equivalent, "Smith for Congress" has an accepted meaning that does not vary with context. In contrast, the meaning of the phrases in the advertisements could conceivably mean "vote for Candidate X" only when considered in the context of an event extraneous to the four corners of the advertisement. Because such contextual factors are irrelevant to our inquiry, the meaning of phrases such as "Judge Keith Starrett—a common sense justice" is at best ambiguous—unless matters outside the advertisement are taken into account and cannot constitute express advocacy.

Finally, the State suggests that, even if the content of the advertisements does not expressly advocate the election of the featured candidates, the web site referenced in the commercials (www.LitigationFairness.org) did so because it included a page directing viewers to two of the candidates' campaign web sites under the heading "Mississippi Candidate

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[15] Following the logic of amici's argument, any laudatory phrase uttered in connection with a candidate's name during election season would be the equivalent of "Smith for Congress." We think that this broad interpretation of express advocacy runs counter to the Supreme Court's stated concerns about the overbreadth of government regulation of political speech. *See Buckley*, 424 U.S. at 42-43, 64-67, 80, 96 S.Ct. 612.

Information." The State argues that we must consider this form of indirect advocacy in determining whether the advertisements themselves are express advocacy. However, the LitigationFairness.org site did not itself contain any statements advocating the election or defeat of candidates. As a result, we find that the connection between the advertisements and the candidates' official sites is simply too tenuous to make the advertisements "express advocacy."

Because the Chamber's advertisements do not contain explicit words exhorting viewers to take specific electoral action for or against the featured candidates, we hold that the advertisements do not constitute "express advocacy" under the bright line approach adopted above.[16] As a consequence, the district erred in holding that the advertisements are subject to mandatory disclosure under the Mississippi election statute.

III

We recognize that the result we reach in this case may be counterintuitive to a commonsense understanding of the message conveyed by the television political advertisements at issue. Nevertheless, the result is compelled by the First Amendment, as interpreted by the Supreme Court in its effort to balance the state's interest in regulating elections with the constitutional right of free speech. Accordingly, for the foregoing reasons, we hold that the First Amendment protects the Chamber's advertisements, and consequently the advertisements are not subject to regulation under the Mississippi

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[16] *Cf. Perry v. Bartlett*, 231 F.3d 155, 159-61 (4th Cir.2000) (finding that advertisements that were critical of certain candidates but that "but did not expressly exhort voters to take a particular electoral action" were not express advocacy, despite the fact that the sponsor admitted outside the advertisement that it sought to defeat the candidates), *cert. denied*, 532 U.S. 905, 121 S.Ct. 1229, 149 L.Ed.2d 138 (2001).

election statute. Accordingly, the judgment of the district court is REVERSED and the case is REMANDED for entry of judgment for the plaintiff-appellant.

REVERSED and REMANDED for entry of judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. MISSISSIPPI
Jackson Division

No. 3:00CV778WS

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA

Plaintiff,

v.

MICHAEL MOORE, Attorney General, State of Mississippi,
ERIC CLARK, Secretary of State, State of Mississippi,

Defendants.

Nov. 2, 2000

MEMORANDUM OPINION AND ORDER

WINGATE, *District J.*

Before the court is plaintiff's Motion for Expedited Declaratory Relief under Title 28 U.S.C. §§ 2201 [1] and

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[1] Title 28 U.S.C. § 2201 provides:

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under *section 7428 of the Internal Revenue Code of 1986*, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration,

2202 [2] By its motion, plaintiff Chamber of Commerce of the United States of America (hereinafter "Chamber") asks this court to declare that it may televise certain political advertisements favoring specific candidates for the popularly elected Mississippi Supreme Court without being subjected to Mississippi's law pertaining to election contributions and reporting. To be answerable under Mississippi's laws, says the Chamber, the independent expenditure by a third party must expressly advocate the election or defeat of a clearly identified candidate without cooperation or consultation with any candidate or any authorized committee or agent of such candidate, and which is not made in concert with or at the request or suggestion of any candidate or any authorized committee or agent of such candidate. According to the Chamber, their advertisements discuss issues of public interest; have not been coordinated with any particular candidates; and do not advocate for the election of any candidate. Thus, says the Chamber, if subjected to Mississippi's contribution limits and reporting require ments, it will suffer a severe impairment of its free speech rights under the First Amendment of the United States Constitution.[3]

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whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

[2] Title 28 U.S.C. § 2202 provides:

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

[3] The First Amendment of the United States Constitution provides that, "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech,* or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Attorney General and the Secretary of State of the State of Mississippi (hereinafter "the State of Mississippi"), defendants in this cause, are opposed to plaintiff's requested declaratory relief. Admitting that they have no proof whatsoever of any collaboration between the Chamber and the candidates involved in the advertisements, the defendants contend that plaintiff's advertisements cross the boundary of issue advocacy into the arena of election advocacy and, thus, expressly advocate the election of the favored candidates for the four Mississippi Supreme Court seats.

This court's jurisdiction over this matter is asserted under Title 28 U.S.C. §§ 1331[4], 1334[5] and Title 42 U.S.C. § 1983.[6]

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[4] Title 28 U.S.C. § 1331 states: The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

[5] Title 28 U.S.C. § 1334 states in part: (a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

[6] Title 42 U.S.C.A. § 1983 provides that, "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for

I. BACKGROUND

The State of Mississippi is currently in election season. In addition to the national election for President of the United States and members of Congress, Mississippi is also occupied with electing four members of its Supreme Court. Comprised of nine Justices who hail from three separate districts, the Mississippi Supreme Court, a popularly elected body, is the highest court in the State, standing in review of decisions rendered in the lower County, Circuit, Chancery, and Appeals Courts, themselves staffed by judges who are popularly elected. Except in event of a vacancy when the Governor of the State is empowered to appoint the office-holder, the members of the Mississippi Supreme Court are popularly elected by the citizenry of the respective districts and serve a term of eight years before having again to test the public's confidence at the polls. Although the contenders for the Mississippi Supreme Court are not allowed to run for the office on political party labels [7], the contenders, as any other office-seekers, strive to raise campaign funds, acquire television and radio appearances and post election signs.

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an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

[7] Mississippi Code Annotated § 23-15-973 provides in pertinent part that, "[i] shall be the duty of the judges of the circuit court to give a reasonable time and opportunity to the candidates for the office of judge of the Supreme Court, judges of the Court of Appeals, circuit judge and chancellor to address the people during court terms. In order to give further and every possible emphasis to the fact that the said judicial offices are not political but are held without favor and with abosolute impartiality as to all persons, the judges thereof should be as far removed as possible from any political affiliations or obligations. It shall be unlawful for any candidate . . To align himself . . . with any political faction or any political party. . . ."

Predictably, the candidates, whether incumbent or challenger, run on their qualifications, accomplishments and experience. And, since elections for Mississippi Supreme Court Justices, in character and procedure, are alike any other State election, these elections, too, are covered by Mississippi's election disclosure and reporting laws found at Mississippi Code Annotated §§ 23-15-801, *et seq.*

On October 17, 2000 the United States Chamber of Commerce, a nonprofit corporation residing in the District of Columbia, began televising four advertisements in Mississippi which comment on the backgrounds and qualifications of four candidates for the Mississippi Supreme Court—incumbent Chief Justice Lenore Prather, Justices Jim Smith and Kay Cobb, and candidate Judge Keith Starrett. According to the Chamber, these advertisements do not fall within the embrace of Mississippi's election disclaimer and reporting laws because these advertisements do not advocate for the election or defeat, of these, or any candidates.

State Attorney General Mike Moore and Secretary of State Eric Clark disagree, contending further that these advertisements constitute "independent expenditures" subject to the reporting requirements of Mississippi Code Annotated §§ 23-15-801(j) [8] and 809 [9]. Faced with the perceived risk of

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[8] Miss.Code Ann. § 23-15-801(j) provides: The term "independent expenditure" shall mean an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate or any authorized committee or agent of such candidate, and which is not made in concert with or at the request or suggestion of any candidate or any authorized committee or agent of such candidate.

[9] Miss Code Ann. § 23-15-809 provides: (a) Every person who makes independent expenditures in an aggregate amount or value in excess of Two Hundred Dollars ($200.00) during a calendar year shall file a statement containing the information required under Section 23-15-807. Such statement shall be filed with the appropriate offices as provided for

civil and criminal penalties [10] for continuing to televise these advertisements, the Chamber brought this lawsuit seeking to have this court declare its rights in this matter.

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in Section 23-15-805, and such person shall be considered a political committee for the purpose of determining place of filing.

(b) Statements required to be filed by this section shall include:

(i) Information indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved;

(ii)Under penalty of perjury, a certification of whether or not such independent expenditure is made in cooperation, consultation or concert with, or at request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(iii) The identification of each person who made a contribution in excess of Two Hundred Dollars ($200.00) to the person filing such statement which was made for the purpose of furthering an independent expenditure.

[10] Mississippi Code Annotated § 23-15-811 provides that, "(a) Any candidate or any other person who shall wilfully and deliberately and substantially violate the provisions and prohibitions of this article shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine in a sum not to exceed Three Thousand Dollars ($3,000.00) or imprisoned for not longer than six (6) months or by both fine and imprisonment.

(b) In addition to the penalties provided in paragraph (a) of this section, any candidate or political committee which is required to file a statement or report which fails to file such statement or report on the date in which it is due may be compelled to file such statement or report by an action in the nature of a mandamus.

(c) No candidate shall be certified as nominated for election or as elected to office unless and until he files all reports required by this article due as of the date of certification.

(d) No candidate who is elected to office shall receive any salary or other remuneration for the office unless and until he files all reports required by this article due as of the date such salary or remuneration is payable.

(e) In the event that a candidate fails to timely file any report required pursuant to this article but subsequently files a report or reports containing

II. THE ADVERTISEMENTS

The four advertisements precipitating this lawsuit are marked as Exhibits B, C, D and E to the plaintiff's complaint. Each advertisement is described below.

Exhibit B The Chief Justice Lenore Prather Advertisement

Exhibit B begins with the photograph of a gavel and a picture of Chief Justice Lenore Prather slowly materializes in the background. The narration states, "Lenore Prather -Chief Justice of Mississippi's Supreme Court; Lenore Prather—using common sense principles to uphold the law; Lenore Prather--putting victims rights ahead of criminals and protecting our Supreme Court from the influence of special interests." As the narration proceeds, the words "Chief Justice," "Common Sense," and "Victims Rights" appear on the screen. The narrator then states that Lenore Prather was the first woman appointed to the Mississippi Supreme Court, and that she has thirty-five years of experience.

Exhibit C The Judge Keith Starrett Advertisement

Exhibit C begins with the narration, "Keith Starrett—a common sense Justice." As pictures of Judge Starrett appear on the screen, followed by scenes of school children and scenes of citizens going about their daily routines, the narrator says that Keith Starrett formed the first drug court in Mississippi, and that Starrett's drug court saved taxpayers over one half million dollars in the first year. Then, as the words "Baptist Deacon" and "Victim's Rights Count" appear on the screen, the narration states, "a Baptist Deacon who once headed South Mississippi Child Protection, Starrett

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all of the information required to be reported by him as of the date on which the sanctions of paragraphs (c) and (d) of this section would be applied to him, such candidate shall not be subject to the sanctions of said paragraphs (c) and (d).

knows victims have as much a right to justice as defendants do." The narration closes with, "Judge Keith Starrett—he knows victims rights count!"

Exhibit DThe Justice Kay Cobb Advertisement

Exhibit D is an advertisement touting incumbent Justice Kay Cobb. The narration provides the following, "A teacher, a prosecutor, a Supreme Court Judge. Justice Kay Cobb. At the Bureau of Narcotics she took drug pushers off the streets and put them behind bars. On the Supreme Court she uses common sense to protect the rights of victims." These words appear on the screen simultaneously as they are narrated. The narration then continues with, "Justice Kay Cobb has worked to end the judicial backlog, eliminate endless appeals and insure that death penalty cases are tried promptly." The narration concludes, "Justice Kay Cobb—victims rights count!"

Exhibit E The Justice Jim Smith Advertisement

Finally, Exhibit E is an advertisement for Justice Jim Smith. An American flag is in the background. The name Jim Smith remains visible throughout the narration, and a scales-of-justice appears in the left part of the screen. While the narration explains that Jim Smith uses common sense and puts victim's rights first, the words, "96% conviction rate" appear on the screen. The narrator states that, "[a]s a district attorney and prosecutor he had a 96% conviction rate. As a judge, he understands that victims rights come ahead of criminal's rights. Judge Jim Smith. For ten years on the Rankin County bench he upheld existing laws--instead of trying to make new ones. He carried that same common sense approach to the Supreme Court in 1993." The narration ends with, "Judge Jim Smith—common sense on the bench!"

All of the advertisements are about thirty seconds in length, and direct the viewer to a web site, *www.Litigation*

Fairness.org, which contains a link to web pages which urge the support of the election of two of these particular candidates, Justice Cobb and Judge Starrett, while presenting the biographies of Chief Justice Prather and Justice Smith. A sample of these web pages are attached to this opinion as an appendix.

The advertisements *sub judice* do not dwell on any particular issue, but instead ascribe attributes which a voter might find to be desirable in a candidate for judicial office to each of the named candidates. Nor do the advertisements discuss, mention, implicate or concern any person other than the particular candidate being touted in the advertisement. The prominent references to judicial philosophy (common sense) and victim's rights are not accompanied by any elaboration. While the plaintiff contends that technically there is no mention of an election in these advertisements, the State of Mississippi notes that they are being aired at the same time statewide judicial elections are being conducted.

III. STANDING AND RIPENESS

A federal court must find that Article III standing requirements are met before proceeding. These requirements include (1) "injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) causation, meaning that the injury is "fairly traceable to the challenged action of the defendant"; and (3) redressability, meaning that "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Valley v. Rapides Parish School Board,* 145 F.3d 329, 332 (5th Cir.1998), citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). The standing component that deals directly with ripeness is the requirement of "imminence." In a declaratory action, the threatened injury must be "sufficiently 'imminent' to

establish standing." *Id.* A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *See Texas v. United States,* 523 U.S. 296, 118 S.Ct. 1257, 1259-60, 140 L.Ed.2d 406 (1998).

In the instant case the parties agree that the Chamber has standing, and the likelihood of litigation is conceded by the parties to be imminent. Therefore, the ripeness balance weighs in favor of addressing this controversy.

IV. THE APPLICABLE MISSISSIPPI STATUTES

The Mississippi statutes providing the focal point of this lawsuit are Mississippi Code Annotated §§ 23-15-801(j) and 23-15-809, statutes dealing with independent expenditures for the purpose of advocating a particular electoral result, but without consulting with or obtaining the cooperation of any candidate. The Attorney General acknowledges that the advertising expenditures in question are individual expenditures, and that he has no proof that the Chamber has consulted any candidate or acted in collusion with any candidate in presenting these advertisements.

Mississippi Code Annotated § 23-15-801(j) provides that the term "independent expenditure" shall mean an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate, without that candidate's cooperation or consultation. Mississippi Code Annotated § 23-15-809 provides that a person who makes independent expenditures in the amount or value of Two Hundred Dollars ($200.00) or more during a calendar year shall file a statement containing the information required under § 23-15-807.

The Chamber contends that if these statutes are applied to the advertisements in question, then their application will offend the First and Fourteenth Amendments of the United

States Constitution. The guaranties afforded by the First Amendment are protected by the due process clause of the Fourteenth Amendment. *Williams v. Rhodes,* 393 U.S. 23, 30-31, 89 S.Ct. 5, 10, 21 L.Ed.2d 24, 31 (1968); *New York Times v. Sullivan,* 376 U.S. 254, 276-77, 84 S.Ct. 710, 724, 11 L.Ed.2d 686, 709 (1964); *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213, 1217 (1940); and *De Jonge v. Oregon,* 299 U.S. 353, 364, 57 S.Ct. 255, 260, 81 L.Ed. 278, 283 (1937). There is no question that political expression is protected speech under the First Amendment. *Colson v. Grohman,* 174 F.3d 498, 506 (5th Cir.1999), citing *Connick v. Myers,* 461 U.S. 138, 145, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). The United States Supreme Court often has reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection. *First National Bank v. Bellotti,* 435 U.S. 765, 776, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) (stating that speech on matters of public concern is "at the heart of the First Amendment's protection"); and *RashAldridge v. Ramirez,* 96 F.3d 117, 119 (5th Cir.1996) (same).

V. THE UNITED STATES SUPREME COURT PRECEDENTS

The fountainhead case governing the issues of concern in the instant case is *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). The *Buckley* decision limited the range of political speech that may be regulated by the Federal Election Campaign Act only to "express advocacy," that is, a communication which explicitly advocates the election or defeat of clearly identifiable candidates. The Supreme Court's decision distinguished "issue advocacy," which is the discussion of issues and/or candidates' positions on them. Under *Buckley,* this form of communication is not subject to regulation. The *Buckley* decision, particularly its statement at footnote 52, has given rise to what is now referred to as the

"express advocacy" standard. Footnote 52 of the *Buckley* opinion refers to § 608(e)(1) of the Federal Election Campaign Act and to the construction of statute's scope as being limited to communications containing express words of advocacy of election or defeat, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." Other courts have given the "express advocacy" standard the rubric "magic words" test, or "bright line" rule. *See Federal Election Commission v. Christian Action Network, Inc.*, 110 F.3d 1049, 1051 (4th Cir.1997), referring to the "magic words" of Buckley's footnote 52; *and see Faucher v. Federal Election Commission,* 928 F.2d 468 (1st Cir.), *cert. denied,* 502 U.S. 820, 112 S.Ct. 79, 116 L.Ed.2d 52 (1991) (for the reference to a "bright line" rule being established by *Buckley*). Whether the standard is referred to as "express advocacy" or "magic words," or the "bright line" rule, many courts interpret this standard to require words of advocacy such as those recited in footnote 52 of the *Buckley* opinion before regulatory jurisdiction over an independent or corporate expenditure can exist.

The United States Supreme Court revisited the *Buckley* decision in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248-49, 107 S.Ct. 616, 623, 93 L.Ed.2d 539 (1986) (a case often referred to in short as "MCFL"). Here the Supreme Court was faced for the first time since its decision in *Buckley* with a form of advertisement, specifically, a newsletter.

The MCFL, an nonprofit group concerned with right-to-life issues, prepared and distributed a newsletter in the ordinary course of its operations. Prior to the September 1978 primary elections, the MCFL printed and distributed a "Special Edition" of its newsletter. While the May 1978 edition of the newsletter had been mailed to 2,109 people, and the October 1978 edition to 3,119 people, more than 100,000 copies of the

"Special Edition" were printed for distribution. The front page of the publication was headlined "EVERYTHING YOU NEED TO KNOW TO VOTE PRO-LIFE," and readers were admonished that "[n]o pro-life candidate can win in November without your vote in September." "VOTE PRO-LIFE" was printed in large bold-faced letters on the back page, and a coupon was provided to be clipped and taken to the polls to remind voters of the name of the "pro-life" candidates. Next to the exhortation to vote "pro-life" was a disclaimer: "This special election edition does not represent an endorsement of any particular candidate."

The *MCFL* Court also held that an expenditure must constitute "express advocacy" in order to be subject to the statutory prohibition in question, and that the Special Edition constituted express advocacy, citing *Buckley.* The *MCFL* Court stated that, "*Buckley* adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons. We therefore concluded in that case that a finding of 'express advocacy' depended upon the use of language such as 'vote for,' 'elect,' 'support,' etc." *MCFL*, 479 U.S., at 248, citing *Buckley, supra,* at 44, n. 52, 96 S.Ct., at 646, n. 52. The MCFL Court then noted that the Special Edition not only urged voters to vote for "pro-life" candidates, but also identified and provided photographs of specific candidates fitting that description. Said the Court, "[t]he Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, *it provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than 'Vote for Smith' does not change its essential nature. . . .*" *MCFL*, 479 U.S., at 240 (Emphasis added).

Thus, the *MCFL* Court, faced with an actual communication, determined that "express advocacy" was present in the "Special Edition" of MCFL's newsletter based on the

timing of the edition, the unusually large quantity of copies being disseminated, and the exhortations to vote for pro-life candidates, notwithstanding the absence of the "magic words" found at footnote 52 of the *Buckley* decision.

VI. THE CIRCUIT DIVIDE

A. The Narrow Interpretation

Several Circuit Courts which have had the opportunity to apply the "express advocacy" test based on *Buckley* and *MCFL* have adopted a very narrow construction of what these cases require. For instance, in *Maine Right to Life Committee, Inc. v. Federal Election Commission, 914 F.Supp. 8 (D.Me.1996), aff'd per curiam, 98 F.3d 1 (1st Cir.1996)* (referring to *Buckley* as having established a "bright line" rule), a nonprofit membership corporation and a reader of its publications brought suit seeking a declaratory judgment that the Federal Election Commission's definition of "express advocacy" as to which corporate financial support was prohibited under the Federal Election Campaign Act was too broad, beyond authority, and unconstitutionally vague. The district court agreed, applying the bright line rule that a finding of "express advocacy" requires the presence in a communication of some or all of the explicit words found at footnote 52 of the *Buckley* opinion. Like *Buckley, Maine Right to Life Committee* dealt with the interpretation of legislation rather than a specific communication. *See also, Faucher v. Federal Election Commission,* 743 F.Supp. 64, 68 (D.Me.1990), *aff'd,* 928 F.2d 468 (1st Cir.), *cert. denied*, 502 U.S. 820, 112 S.Ct. 79, 116 L.Ed.2d 52 (1991), following *Buckley* by narrowly construing the same federal election laws considered in *Buckley.*

In *Federal Election* Commission *v. Christian Action Network,* 110 F.3d 1049 (4th Cir.1997), the Fourth Circuit affirmed the district court's dismissal of a Federal Election Commission lawsuit which complained that an advocacy

organization's expenditures for a television commercial violated federal election laws governing disclosure of campaign funds. The advertisement in question included the following text which was read by a narrator: "Bill Clinton's vision for America includes job quotas for homosexuals, giving homosexuals special civil rights, allowing homosexuals in the armed forces. Al Gore supports homosexual couples' adopting children and becoming foster parents. Is this your vision for a better America? For more information on traditional family values, contact the Christian Action Network."

The Fourth Circuit opted for the clear, categorical limitation of *Buckley,* holding that only expenditures for communications using explicit words of candidate advocacy are prohibited . . . ." *Id.* at 1051. The Fourth Circuit therefore rejected the Federal Election Commission's position that "express advocacy" could be established by looking at a group's use of imagery, rhetoric, and symbols in criticizing a candidate's position. *Id.,* at 1064.

In *Iowa Right to Life Comm., Inc. v. Williams,* 187 F.3d 963 (8th Cir.1999), various organizations which had as one of their purposes political speech sought a preliminary injunction against the enforcement of a provision of an Iowa Campaign Disclosure-Income Tax Check-off Act containing reporting requirements for independent political expenditures. The district court granted the injunction and the Eighth Circuit affirmed, holding that the Buckley decision made clear that a "finding of 'express advocacy' depend[s] upon the use of language such as 'vote for,' 'elect,' 'support,' etc." Significantly, the Eighth Circuit noted that Buckley did not provide an exclusive list of words, and that any such communication must contain express language of advocacy with an exhortation to elect or defeat a candidate. The Eighth Circuit also cited *Federal Election Commission v. Furgatch,* 807 F.2d 857, 864 (9th Cir.1987) and its teaching that speech

may be termed "advocacy" if it presents a clear plea for action. Speech that is merely informative, said the Eighth Circuit, is not covered by the Act. [11]

Vermont Right to Life Committee v. Sorrell, 221 F.3d 376 (2nd Cir.2000), involved a nonprofit corporation (the VRLC) whose goal was to promote right-to-life issues. The VRLC brought a § 1983 action against various state officials, seeking a declaratory judgment that certain sections of a Vermont campaign finance law establishing disclosure requirements for political advertising and reporting requirements for mass media expenditures were facially unconstitutional under the First Amendment. The Second Circuit reversed the district court's dismissal of the case, holding that the plaintiffs had standing. The Court noted that a significant issue would be whether the state statutes in question applied only to advertising and "mass media activities" "that expressly advocated the election or defeat of a clearly identified candidate," citing *Buckley. See also, Federal Election Commission v. Central Long Island Tax Reform Immediately Committee,* 612 F.2d 45 (2nd Cir.1980), following the narrower standard based on *Buckle*'s footnote 52.

B. The Broader Interpretation

Set against the narrow interpretation applied by the First, Second, Fourth and Eighth Circuits is the Ninth Circuit's

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[11] While the Eighth Circuit's decision is touted by the plaintiffs and strictly following *Buckley,* it is apparent that the Eight Circuit did not consider a finding of express advocacy to be stricly limited to the words contained in *Buckley*'s footnote 52, noting that in *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850, 108 S.Ct. 151, 98 L.Ed.2d 106 (1987), the Ninth Circuit had allowed the prohibition of the "Don't Let Him Do It" speech as expressed advocacy, and recognizing that the ruling was "a very close call," *id.,* at 861.

decision in *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850, 108 S.Ct. 151, 98 L.Ed.2d 106 (1987). According to *Furgatch,* express advocacy may exist if the purpose of the message in question is suggestive of only one meaning, makes a clear plea for action, and is clear as to what action is advocated. *Id.,* at 864.

Furgatch involved an enforcement action against an individual for publishing a newspaper advertisement critical of President Jimmy Carter and urging the readers "Don't let him do it." The Federal Election Commission (hereinafter the "FEC") sued, claiming a violation of Federal Election Campaign Act for the failure to report this expenditure to the FEC and to place a disclaimer on it. The Ninth Circuit agreed with the FEC that these violations had occurred, stating that, "reasonable minds could not dispute that Furgatch's advertisement urged readers to vote against Jimmy Carter. This was the only action open to those who would not 'let him do it.'" *Id.,* at 864. The court summarized its holding as follows:

> We conclude that speech need not include any of the words listed in Buckley to be express advocacy under the Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate. This standard can be broken into three main components. First, even if it is not presented in the clearest, most explicit language, speech is "express" for present purposes if its message is ummistakable and unambiguous, suggestive of only one plausible meaning. Second, speech may only be termed "advocacy" if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act. Finally, it must be clear what action is advocated. Speech cannot be "express advocacy of the election or defeat of a clearly identified candidate" when reasonable

> minds could differ as to whether it encourages a vote for or against a candidate or encourages the reader to take some other kind of action. We emphasize that if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy subject to the Act's disclosure requirements. This is necessary and sufficient to prevent a chill on forms of speech other than the campaign advertising regulated by the Act. At the same time, however, the court is not forced under this standard to ignore the plain meaning of campaign-related speech in a search for certain fixed indicators of 'express advocacy.'"

Id., at 864.

The *Furgatch* decision takes its lead from the United States Supreme Court's decisions in both *Buckley* and *MCFL.*[12] Cases which have adopted the approach taken in the *Furgatch* decision are *FEC v. National Organization for Women*, 713 F.Supp. 428, 434 (D.D.C.1989); *Osterberg v. Peca*, 12 S.W.3d 31, 52 (Tex.2000); *Elections Bd. v. Wisconsin Manufacturers & Commerce*, 227 Wis.2d 650, 597 N.W.2d 721, 723-24, 731 (Wisc.1999); and *State ex rel. Crumpton v. Keisling*, 160 Or.App. 406, 982 P.2d 3, 10 (Or.Ct.App.1999).

In *Federal Election Commission v. National Organization for Women,* NOW used corporate money to pay for three

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[12] The *Furgatch* Court cited the First Circuit's opinion in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 769 F.2d 13 (1st Cir.1985)(MCFL), which was on appeal to the United States Supreme Court at the time the *Furgatch* case was argued to the Ninth Circuit in June of 1986. On December 15, 1986, the United States Supreme Court affirmed the First Circuit's decision in *MCFL.* The Ninth Circuit handed down *Furgatch* on January 9, 1987. Even though the *Furgatch* Court may have missed the opportunity to include the United States Supreme Court citation in its final opinion draft, the relevant points of law remained the same. The First Circuit's *MCFL* decision being affirmed by the United States Supreme Court did not disturb the *Furgatch* decision.

letters sent to the general public which contained so called "electioneering messages." According to NOW, these letters were aimed solely at soliciting new members by setting forth the group's political goals. One of the letters in question urged the recipient to join NOW and to wear a 59 cents button as a symbol of the fact that women earn 59 cents for every dollar earned by men. While the letter focused on issues (wage discrimination, Social Security, divorce law, education), it also criticized political leaders for their adverse positions or lack of attention to these issues. Three sentences in the four-page "59 cents letter" are critical of public officials: "And now the Reagan Administration is threatening to make a dangerous situation even worse . . . ." "A bad economy, coupled with an antagonistic Administration in Washington, poses an immediate and real threat to the economic rights of women everywhere . . . . "; and "The New Right, the Reagan Administration, and the Republican Party all thought that "the ladies" would go away after the ERA deadline expired. Were they ever wrong!"

The district court held that this and two other similar letters contained no express advocacy as required by *Buckley* and *MCFL* to place the letters within the ambit of the federal statute. "The words listed in *Buckley*," said the district court, "are not the only ones which will be deemed express advocacy. In *Furgatch*, the Ninth Circuit held that express advocacy is not strictly limited to communications using certain key phrases. "The short list of words included in the Supreme Court's opinion in *Buckley* does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate." *Furgatch*, 807 F.2d at 863. The court of appeals proposed a standard for express advocacy: that speech, when read as a whole and with limited reference to external events, may only be interpreted as an exhortation to vote for or against a specific candidate."

Following the broader standard, the district court concluded that, "[b]ecause the letters are suggestive of several plausible meanings, because there are numerous pleas for action, and because the types of action are varied and not entirely clear, NOW's letters fail the express advocacy test." 713 F.Supp., *at 435*. The district court also noted that NOW's three mailings included no explicit words directing the reader how to vote.

In *State ex rel. Crumpton v. Keisling,* the Oregon Court was confronted with mailings and newspaper advertisements that contained a "WARNING" that public employee unions were buying the "DEMOCRAT[IC] ELECTIONS." These advertisements contained the pictures of particular candidates and the amount of support each had received from public employee unions. The Oregon court expressed the same concerns as the Ninth Circuit in *Furgatch* that election laws must not be "cleverly circumvented, or thwarted by a rigid construction." Thus, the Court adopted the *Furgatch* "reasonable minds could differ" test. 160 Or.App. 406, 982 P.2d 3, 10 (Or.Ct.App.1999). "The purpose," said the Court, "is not to search for magic words—which careful drafters can, as in this case, usually avoid—but to find the essential message that the publication communicates to the reader. In doing this, the context of the publication—particularly whether or not it came in the midst of a contested election campaign—n play a role in determining how the reader would understand it and, thus, what its message is." *Id.*

In *Osterberg v. Peca*, 12 S.W.3d 31, 52 (Tex.2000), the Osterbergs, aggrieved at a ruling by Judge Peca, donated $34,200.00 to the campaign of his opponent in the subsequent election, and paid for a television advertisement which consisted of the following text: "CONSIDER THIS: Judge Peca was chosen by his peers El Paso's outstanding jurist; He graduated Summa Cum Laude; He worked to reduce his docket for over seven years; IF THAT'S ENOUGH, VOTE

FOR HIM. [next screen] But if you want ONE who understands: The Courthouse exists for the people . . . etc. BRING THE COURTHOUSE BACK TO THE PEOPLE! VOTE FOR HIS OPPONENT and remove HIM if he fails the will of the people!" The Texas Court refused to accept the contention that the *Buckley* test required the application of a rigid standard, noting that while *Buckley* restricted "express advocacy" to "spending that is unambiguously related to the campaign of a particular federal candidate" and to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject," ' *Id.* at 44 n. 52, the United States Supreme Court in *MCFL* had stepped beyond the rigid test of *Buckley* by stating that a message can be "marginally less direct" than the examples listed in *Buckley* so long as its essential nature "goes beyond issue discussion to express electoral advocacy." *See MCFL*, 479 U.S., at 249.

The *Osterberg* Court also observed that the descriptions given in *Buckley* and *MCFL,* "do not give unambiguous answers to the myriad situations that arise." *Id.*, 12 S.W.3d, at 52, citing *Wisconsin Right to Life, Inc. v. Paradise*, 138 F.3d 1183, 1186 (7th Cir.), *cert. denied*, 525 U.S. 873, 119 S.Ct. 172, 142 L.Ed.2d 140 (1998) for that same observation.

VII. THE RESPECTIVE POSITIONS OF THE PARTIES SUB JUDICE

The Chamber contends that this court must employ the "magic words" test to this dispute *sub judice,* a standard, says the Chamber, which has been applied by the majority of other jurisdictions which have had the opportunity to address this question. So long as the words used in Buckley's footnote 52 are avoided, says the Chamber, political speakers avoid regulation under any circumstances. During oral argument this court posed a number of hypotheticals to counsel for the

Chamber seeking to determine the Chamber's perspective on the scope of *Buckley*. In response to each of the court's hypotheticals, Chamber's counsel responded that unless the advertisements contained one of the eight magic words appearing at *Buckley*'s footnote 52, the advertisements should not be construed as examples of express advocacy.[13]

In contrast, the State of Mississippi argues that the court should not leave common sense at the doorstep when it considers these matters, and that the definition of "express advocacy" should not require the court to be blind to what all "others can see and understand." The "magic words" approach, says the State of Mississippi, creates a large loophole which would allow all forms of organizations inside and outside of Mississippi to spend unlimited funds on commercials which unambiguously support candidates, with no transparency regarding the source of the funding. The Chamber, says the State of Mississippi, should not be permitted to take refuge in the "magic words" approach simply by cleverly omitting from the commercials in question the specific words listed at footnote 52 of the *Buckley* decision. In summary, the State is concerned that persons or organizations will surreptitiously advocate the election or defeat of a named candidate but avoid legitimate government

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[13] During oral argument this court asked plaintiff's counsel whether either of the following instances would offend the express advocacy test:

> (1) a narration of the favored candidate's qualifications, a picture of the favored candidate along side the opponent with a line drawn through the picture of the opponent, all superimposed over people standing in what appears to be a voting line; and (2) an advertisement identical to one paid for and run by a specific candidate in which the candidate merely states a qualification while the independent ad simply omitting the words "vote for me" contained in the candidate's ad. Counsel responded that neither of these examples contained express advocacy under the bright line standard of *Buckley*. Thus, plaintiff's counsel sees no crack in the express advocacy test, unless the ad contains "magic words."

regulation by simply omitting "magic words" of advocacy. *See Iowa Right to Life Comm., Inc. v. Williams,* 187 F.3d 963, 970 (8th Cir.1999) (commenting on the State of Iowa's position in the *Williams* case).

VIII. ANALYSIS

Express advocacy is a very narrow class of election-related speech that in "explicit words" or by "express terms advocates the election or defeat of a clearly identified candidate." *Federal Election Commission v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 248-49, 107 S.Ct. 616, 623, 93 L.Ed.2d 539 (1986). In contrast to express advocacy, issue advocacy is the discussion of issues and candidates' positions on those issues without expressly advocating a candidate's election or defeat. The United States Supreme Court has recognized that issue advocacy sometimes may influence the election or defeat of particular candidates, but that does not convert it into express advocacy. Issue advocacy is protected by the First Amendment and can be subjected to no regulation, regardless of its effect on an election. *See MCFL,* 479 U.S., at 257 n. 10. So, the question to be resolved by this court is whether the advertisements at hand constitute merely issue discussion, or whether they expressly advocate for the election of a particular candidate. A court analyzing whether a given statute comports with the First Amendment must hesitate before "imposing judicial formulae so rigid that they become a straightjacket that disables Government from responding to serious problems." *Denver Area Education Telecommunications. Consortium, Inc. v. F.C.C.,* 518 U.S. 727, 116 S.Ct. 2374, 2385, 135 L.Ed.2d 888 (1996).

This court, in opposition to the Chamber's urgings, declines to strictly limit express advocacy to the "magic words" of *Buckley*'s footnote 52. As *Furgatch* correctly observed, *Buckley*'s footnote 52 does "not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate." *Furgatch,* at pages 862-63.

Further, and even more importantly, the United States Supreme Court itself, in this court's eye, in *MCFL* determined to move beyond the rigid, overly simplistic "magic words" test of *Buckley.* In *MCFL,* the Court seemingly moved away from a rigid, talismanic application of *Buckley* 's footnote 52 to an "essential nature" inquiry, as the Court found express advocacy even though the communication at issue was, "marginally less direct than 'Vote for Smith'," one of the "magic words" contained in footnote 52 of the *Buckley* opinion.

Whether examining the advertisements at hand under the "essential nature" test of *MCFL,* or under *Furgatch*'s "no other reasonable interpretation" test, this court finds that the advertisements at issue provide explicit directives to vote for the named candidates. These advertisements simply cannot be regarded as mere discussions of public issues. Aired [14] at the very time statewide judicial elections were being conducted in Mississippi, the advertisements contain no true discussion of issues. While the advertisements mention "victims rights" and a "common sense judicial philosophy," the advertisements present no elaboration of these points. Instead, while providing only the background and experience of each candidate, the advertisements repeatedly insert the candidates' names between qualification assertions and each advertisement concludes with an emphatic phrase obviously designed to exhort support for the candidates' election to the Mississippi Supreme Court. Although the express words "vote for the candidate" do not appear anywhere in the advertisements, no reasonable viewer would construe the advertisements otherwise. The viewer sees a sleek, well

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[14] While timing itself is no talisman of express advocacy, it is a useful element in the court's overall consideration, just as it was in *MCFL,* where the Supreme Court noted that the 1000,000 copies of the "Special Edition" were prepared for dissemination during the September 1978 primary elections.

prepared advertisement, just as a candidate's campaign staff might prepare.

Further, these advertisements are virtually the same as the advertisements being aired by the candidates themselves. The advertisements repeat the touted candidates' names in the very same manner as the candidates own advertisements which exhort the viewing public to vote for the named candidates. In this court's view, a finding of any use of "magic words" becomes unnecessary when an advertisement clearly champions the election of a particular candidate as the person who will use common sense, ensure prompt adjudication of death penalty cases and uphold victim's rights.

The advertisements display a web site, *www.Litigation-Fairness.org*. Significantly, when accessed, the web site contains a link entitled "Mississippi Candidate Information." The link ultimately leads to web pages which exhort the public's support for the election of two of the named candidates, Justice Kay Cobb and Judge Keith Starrett.

True issue advocacy invigorates debate on many issues such as the environment, civil rights, welfare and education, and other matters which, due to their nature, may name candidates who are either supportive of, or contrary to a particular issue. Also critical in the overall calculus, however, is the necessity of having legislation which is effective and capable of informing the public, while condemning abuse of the special status given to true issue advocacy. Ever seeking to be vigilant for the protection of true issue advocacy, this court concludes that legitimate issue advocacy is not before the court today, and that this ruling will not have a chilling effect upon those anxious to exercise their First Amendment political speech rights.

IX. CONCLUSION

Therefore, this court finds the advertisements in question contain express advocacy, and are offensive under *Buckley*

and *MCFL*. This court is persuaded that these advertisements do not attempt to discuss issues. Rather, the advertisements offer thinly veiled exhortations to support the campaigns of the aforesaid candidates, a plain, clever attempt to avoid the reach of the Mississippi reporting and disclosure laws by eliminating those words listed at footnote 52 of *Buckley*.

Accordingly, this court hereby denies the request of the Chamber of Commerce of the United States of America for declaratory relief from any subjection to the Mississippi laws governing independent expenditures. Instead, the court finds that the advertisements at issue which favor four specific candidates for the popularly elected Mississippi Supreme Court expressly advocate their elections and, as such, the Chamber must answer under Mississippi's contribution limits and reporting requirements as found at Mississippi Code Annotated §§ 23-15-801 *et seq*.

The Court shall enter a separate judgment in accordance with Rule 58 of the Federal Rules of Civil Procedure.

[MATERIALS ATTACHED TO DISTRICT COURT OPINION NOT REPRODUCED].

APPENDIX C

IN THE UNITED STATED DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

[Filed Jan 23, 2001]

Civil Action No. 3:00-cv-778WS

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
Plaintiff,

VS.

MICHAEL MOORE, Attorney General, State of Mississippi, ERIC CLARK, Secretary of State, State of Mississippi,
Defendants.

FINAL JUDGMENT

This cause came before the court on the plaintiff's Motion for Expedited Declaratory Relief under Title 28 U.S.C. §§ 2201 [1] and 2202 [2], asking this court to declare that the

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[1] Title 28 U.S.C. § 2201 provides:

> (a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration,

plaintiff may televise certain political advertisements favoring specific candidates for the popularly elected Mississippi Supreme Court without being subjected to Mississippi's law pertaining to election contributions and reporting. This court after considering the arguments and briefs of the parties, found in a separate Memorandum Opinion and Order that the advertisements at issue provided explicit directives to vote for the named candidates, and were subject to Mississippi's law governing election contribution disclosure. Therefore, in accordance with this court's Memorandum Opinion and Order, this court finds for the defendants and against the plaintiff, and the defendants are entitled to recover costs.

SO ORDERED AND ADJUDGED this the 23rd day of January, 2001.

/s/ Henry T. Wingate
HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE

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whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

[2] Title 28 U.S.C. § 2202 provides:

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed May 28, 2002]

No. 00-60779

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

MIKE MOORE, Attorney General, State of Mississippi;
ERIC CLARK, Secretary of State, State of Mississippi,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Mississippi, Jackson

ON PETITION FOR REHEARING *EN BANC*

(Opinion 04/05/02, 5 Cir., ____, ____, F.3d ____).

Before JOLLY and PARKER,* *Circuit Judges*, and MILLS,** *District Judge*.

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is

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* Judge Patrick E. Higginbotham did not participate in the consideration of the rehearing en banc.

* Judge Rheas H. Barksdale did not participate in the consideration of the rehearing en banc.

** District Judge of the Central District of Illinois, sitting by designation.

DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

APPENDIX E

Miss. Code Ann. § 23-15-801. (J)

* * * *

(j) The term "independent expenditure" shall mean an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate or any authorized committee or agent of such candidate, and which is not made in concert with or at the request or suggestion of any candidate or any authorized committee or agent of such candidate.

* * * *

APPENDIX F

Miss. Code Ann. § 23-15-809. Statements by persons other than political committees; filing; indices of expenditures.

(a) Every person who makes independent expenditures in an aggregate amount or value in excess of Two Hundred Dollars ($200.00) during a calendar year shall file a statement containing the information required under Section 23-15-807. Such statement shall be filed with the appropriate offices as provided for in Section 23-15-805, and such person shall be considered a political committee for the purpose of determining place of filing.

(b) Statements required to be filed by this section shall include:

(i) Information indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved;

(ii) Under penalty of perjury, a certification of whether or not such independent expenditure is made in cooperation, consultation or concert with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and

(iii) The identification of each person who made a contribution in excess of Two Hundred Dollars ($200.00) to the person filing such statement which was made for the purpose of furthering an independent expenditure.

APPENDIX G

The Murphy Pintak Gautier Hudome Agency, Inc.

:30 Television
Date: October 10, 2000

Client: U.S. Chamber of Commerce
Title: "Chief Justice"
Spot #: USCC-1041

Video:	Audio:
Photo of gavel. Photo of Justice Prather begins as big blur and slowly comes into focus during spot. Font: Lenore Prather Chief Justice Common Sense Victims Rights Lenore Prather Independent First woman Justice 35 years experience Justice Lenore Prather. A fair and independent voice. Learn more: www.litigationFairness.org Paid for by U.S. Chamber of Commerce	Lenore Prather—Chief Justice of Mississippi's Supreme Court. Lenore Prather—Using common sense principles to uphold the law. Lenore Prather—Putting victims rights ahead of criminals and protecting our Supreme Court from the influence of special interests. The first woman appointed to Mississippi's Supreme Court, Lenore Prather has 35 years experience on the bench. Lenore Prather. A fair and independent voice for Mississippi.

APPENDIX H

The Murphy Pintak Gautier Hudome Agency, Inc.

:30 Television
Date: October 9, 2000

Client: Stop Lawsuit Abuse in MS
Title: "96 per cent-revised"
Spot #: USSC-1040

Video:	Audio:
Font board over American flag. Font: Judge Jim Smith Common Sense Victims Rights ("Judge Jim Smith" remains up throughout) Font board over American flag with scales of justice screen left. Font: 96% conviction rate Font: Victim's rights ahead of criminals Font: 10 years on Rankin Country bench Upholds existing laws Font: Common Sense on the bench Learn more: www.LitigationFairness.org Paid for by U.S. Chamber of Commerce	Judge Jim Smith. He uses common sense and puts victims rights first. As a district attorney and prosectour he had a 96% conviction rate. As a judge, he understands that victims tights come ahead of criminals rights. Judge Jim Smith. For ten years on the Rankin County bench he upheld existing laws—instead of trying to make new ones. And he carried that same common sense approach to the Supreme Court in 1993. Judge Jim Smith—Common sense on the bench.

APPENDIX I

The Murphy Pintak Gautier Hudome Agency, Inc.

:30 Television
Date: October 9, 2000

Client: Stop Lawsuit Abuse in MS
Title: "Behind Bars-Revised"
Spot #: USCC-1018

Video:	Audio:
Images	A teacher, a prosecutor, a Supreme Court Judge.
Font: Justice Kay Cobb At Bureau of Narcotics she took drug pushers off the streets, put them behind bars	Justice Kay Cobb.
On Supreme Court: used common sense to protect the rights of victims	At the bureau of narcotics she took drug pushers off the streets and put them behind bars.
Justice Kay Cobb	On the Supreme Court she uses common sense to protect the rights of victims.
End judicial backlog	Justice Kay Cobb has worked to end the judicial backlog, eliminate endless appeals and ensure that death penalty case are tried promptly.
Eliminate endless appeals	
Ensure death penalty cases are tried promptly	
Justice Kay Cobb	Justice Kay Cobb—victims rights count.
Victims Rights Count	
Learn more: www.LitigationFairness.org	
Paid for by U.S. Chamber of Commerce	

APPENDIX J

The Murphy Pintak Gautier Hudome Agency, Inc.

:30 Television
Date: October 11, 2000

Client: US Chamber of Commerce
Title: "Drug Court-revised"
Spot #: USSC-1017

Video:	Audio:
Font: Judge Keith Starrett Common sense justice Formed first drug court Saved taxpayers over half million dollars Baptist Deacon SW Mississippi Child Protection Victim's Rights Count Learn more: www.LitigationFairness.org Paid for by U.S. Chamber of Commerce	Judge Keith Starrett—a common sense justice. Keith Starrett formed the first drug court in Mississippi—Starrett's drug court saved taxpayers over one half million dollars in its very first year. A Baptist Deacon who one headed Southwest Mississippi Child Protection, Starrett knows victims have as much a right to justice as defendants do. Judge Keith Starrett—He knows victims rights court

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

[Filed Oct. 23, 2000]

Civil Action No. 3:00CV778BW

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA
Plaintiff,

vs.

MICHAEL MOORE, ATTORNEY GENERAL,
STATE OF MISSISSIPPI; ERIC CLARK
SECRETARY OF STATE, STATE OF MISSISSIPPI,
Defendants.

COMPLAINT FOR EXPEDITED DECLARATORY RELIEF

The Chamber of Commerce of the United States of America ("Chamber"), files this Complaint for Expedited Declaratory Relief to protect the Chamber's rights of free speech guaranteed by the First and Fourteenth Amendments of the United States Constitution.

Specifically, this suit is brought seeking a declaration that the Chamber has a free speech right to televise, without being subject to state election law contribution limits, advertisements which discuss judicial candidates' records on public issues, so long as the Chamber prepares the advertisements independently without coordination with the candidates and the advertisements do not "expressly advocate" a candidate's election.

PARTIES

1. The Chamber is a District of Columbia nonprofit corporation, exempt from taxation under IRS CODE § 501(c)(6). The Chamber was formed in 1912 and incorporated in 1916. Since that time, its purpose has been to represent the interests of business before all three branches of government. It may be found at 1615 H St. NW., Washington, D.C. As a corporation, it is not a group of persons or affiliated organizations.

2. Defendant Eric Clark, Secretary of State for the State of Mississippi may be found at 401 Mississippi St., Jackson, Mississippi 39205. As Secretary of State, he has responsibility for administering the election laws of the State of Mississippi.

3. Defendant Michael Moore, Attorney General for the State of Mississippi may be found at the Carroll Gartin Justice Building, 450 High Street, P.O. Box 220, Jackson, MS 39205. As Attorney General, he has certain powers with respect to the enforcement of elections laws of the State of Mississippi and related criminal statutes.

JURISDICTION

4. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343 and 42 U.S.C. § 1983, as an action to redress the deprivation under color of state law of rights secured by the Constitution of the United States.

5. An actual controversy exists between the Chamber and the defendants within the jurisdiction of this Court and the plaintiff is entitled to a declaratory judgment in certain public issues under 28 U.S.C. §§ 2201 and 2202.

6. Venue is proper for this action in this district pursuant to 28 U.S.C. § 139 1(b).

FACTS

7. This fall, the Chamber has independently sponsored a series of television advertisements concerning candidates for judicial office in several states. An Affidavit of James Wootton is attached as Exhibit A.

8. As a part of that effort, on October 17, 2000, the Chamber began airing television advertisements in Mississippi to inform the public about the experience of certain candidates for the Mississippi Supreme Court in dealing with particular issues of public importance, such as the administration of criminal law. Copies of the scripts of four of the advertisements are attached to this Complaint as Exhibits B, C, D, and E.

9. The Chamber prepared these advertisements itself, without consultation with or cooperation from, the individual candidates concerned.

10. These advertisements do not contain words of express election advocacy, such as "vote for," or "defeat," nor do they exhort voters to do anything.

11. On October 19, Secretary Clark wrote a letter to General Moore urging the Attorney General to investigate and, if warranted, prosecute the Chamber criminally for violations of statutes enumerated in the letter. A copy of the letter is attached to this Complaint as Exhibit F.

12. On the same day, General Moore contacted the Chamber and requested a meeting the next morning at 9:00 a.m. to discuss the advertisements. At the meeting, lawyers for the Secretary and the General listened to the Chamber's legal analysis, but said their investigation would continue. They expressly declined to give the Chamber the assurance that it would not be prosecuted or made the subject of an administrative proceeding. They have also stated that they are considering seeking injunctive relief to ban further broadcasting of the advertisements.

13. The announcement of the Attorney General's investigation has had, and further threatens to have, a chilling effect on political speech. For example, Chief Justice Lenore Prather, who is featured in one of the advertisements, on Friday October 20, asked the Chamber to stop running its advertisements until the investigation could be completed. The plaintiff is now faced with the alternative of withdrawing the advertisements or facing a criminal prosecution. This Complaint has been filed to resolve this controversy.

14. There is a need to expedite a decision on this Complaint because the chamber intends to run additional similar advertisements over the next two weeks until the state elections. This is a case suitable to expedited resolution under FED. R. CIV. P. 57. Typically, controversies of this nature have been resolved in the federal courts either on the pleadings or on summary judgment.

BASIS FOR THE DECLARATION

15. Under the First Amendment, a state has only limited power to regulate political spending that does not pose a threat of corruption by taking the form of a contribution to a candidate or a candidate's committee. It may impose disclosure requirements on what are known as "independent expenditures" but, to avoid vagueness and over breadth, the U.S. Supreme Court has limited that category to expenditures which "expressly advocate" a candidate's election. Under the developed jurisprudence, an advertisement is not express advocacy if it does not contain an explicit exhortation to electoral action, such as "vote for" or "defeat".

16. MISS. CODE ANN. § 23-15-1021 and § 97-13-15, which limit "contributions" for "the purpose of aiding any candidate," is vague and overbroad and, if applied to these advertisements, would violate the First and Fourteenth Amendments of the Constitution of the United States. As a constitutional matter it must be read to apply only to things

ofvalue received by candidates or their committees or, in the alternative, to exempt speech that is not express advocacy. So read, the plaintiffs advertisements do not violate that statute.

17. MISS. CODE ANN. §§ 23-15-801, *et seq.*, which limit regulatory authority over independent expenditures to those which entail "express advocacy," if applied to these advertisements by virtue of the adoption of a meaning of this phrase broader than that allowed by the Constitution, would violate the First and Fourteenth Amendments of the Constitution of the United States.

18. Even if it were ultimately to be determined that the advertisements broadcast by the Chamber are prohibited by Mississippi law and are not protected by the Constitution, it nevertheless would violate the Constitution for their broadcasting to be enjoined. No satisfactory basis exists under the First and Fourteenth Amendments for imposing a prior restraint on the broadcast of these advertisements.

FOR THESE REASONS, the Chamber prays that this Court will declare that:

(1) MISS. CODE ANN. § 23-15-1021 and § 97-13-15, if and as applied to the Chamber's broadcasting of these advertisements, violate the First and Fourteenth Amendments of the Constitution of the United States;

(2) MISS. CODE ANN. §§ 23-15-801, *et seq.*, if and as applied to the Chamber's broadcasting of these advertisements, violates the First and Fourteenth Amendments of the Constitution of the United States;

(3) The Chamber's broadcasting of these advertisements may not be enjoined consistent with the First and Fourteenth Amendments of the Constitution of the

United States; and the Chamber further prays for such other and further relief as may be just and proper including an award of its costs, expenses and attorneys' fees under 42 U.S.C. § 1988.

Respectfully submitted,

Chamber of Commerce of The United States of America

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IN THE UNTIED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO._____

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Plaintiff,

VS.

MICHAEL MOORE, ATTORNEY GENERAL,
STATE OF MISSISSIPPI; ERIC CLARK,
SECRETARY OF STATE, STATE OF MISSISSIPPI,
Defendants.

AFFIDAVIT OF JAMES WOOTTON

CITY OF WASHINGTON
DISTRICT OF COLUMBIA

James Wootton, having been duly sworn, deposes and says as follows:

1. I am president of the. U. S. Chamber Institute for Legal Reform, an affiliate of the Chamber of Commerce of the United States of America ("the U. S. Chamber"). Except as otherwise indicated, the information contained in this affidavit is based on my personal knowledge.

2. The U.S. Chamber is a corporation organized and existing under the laws of the District of Columbia with its principal place of business in Washington, D.C. The U.S. Chamber is a nonprofit corporation that promotes the free enterprise system.

3. On or about October 17, 2000, the U.S. Chamber began airing on several television stations in Mississippi advertisements discussing the background and qualifications of candidates for the Mississippi Supreme Court. The advertisements were informational only, and did not expressly exhort viewers to take any action, and in particular did not encourage viewers to vote for or against any candidate. Scripts for the four advertisements that have been aired by the U.S. Chamber are attached to the Complaint as Exhibits B, C, D, and E. The advertisements were funded through the U.S. Chamber's general account, which contains moneys received from dues, special assessments, and other revenue-producing activities of the U.S. Chamber. The advertisements being run in Mississippi are part of a national effort to educate the public about the importance of state judicial elections. None of the advertisements expressly advocate the election or defeat or any candidate. Although the Ohio Election Commission received a complaint about similar advertisements in Ohio, I have been advised that it promptly found no probable cause to support the complaint.

4. On October 19, I learned that Mississippi's Secretary of State, the Honorable Eric Clark, had written to Mississippi's Attorney General, the Honorable Mike Moore, requesting the Attorney General to consider criminal or other actions because of the U.S. Chamber's advertisements I received a copy of Mr. Clark's letter, which bad been previously released to the press, late in the day on October 19. The letter deemed the advertisements "a very serious matter" and urged "an expedited investigation" into the advertisements. A copy of Mr. Clark's letter is attached to the Complaint as Exhibit F.

5. Also on October 19, U.S. Chamber representatives were contacted by the Attorney General's office to request the presence of U.S. Chamber representatives at a meeting

with the Attorney General and his station October 20. I instructed the U.S. Chamber's counsel to attend the meeting.

6. I am advised that, in response to inquiries from the U.S. Chamber's counsel, the State said at the close of business on October 20 that it was still considering whether it intended to seek judicial intervention or to pursue administrative action. Press reports suggest that the State is investigating the matter, and is considering action at adverse to the U.S. Chamber.

7. The well-publicized investigation by the State and its refusal to say whether it will seek to interfere with the advertisements, or punish the U.S. Chamber for airing them, has cast a cloud over the U.S. Chamber's advertising effort, The U.S. Chamber is now faced with the difficult choice of continuing to exercise its First Amendment rights to speak or to self-censor itself by removing its advertisements to avoid the prospect of punishment. The U.S. Chamber has decided to file this lawsuit to vindicate its right to air these advertisements, and to reduce the chilling effect of the State's ongoing investigation.

8. Although the U.S. Chamber intends to continue airing the three advertisements currently on the air, the State's investigation will clearly affect its decision about whether to air new and additional advertisements. Only by receiving a judicial clarification of its constitutional rights can the U.S. Chamber avoid the intimidating effect of the pending State investigation.

Further affiant sayeth not.

/s/ James Wootton
JAMES WOOTTON

Sworn to and subscribed before me this 28 day of October, 2000

/s/ illegible
Notary Public

My Commission Expires
June 14, 2000

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

[Filed Oct. 30, 2000]

Civil Action No. 3:00CV778WS

CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

MICHAEL MOORE, Attorney General, State of Mississippi;
ERIC CLARK, Secretary of State, State of Mississippi,
Defendants.

ANSWER AND DEFENSES

Defendants Attorney General and Secretary of State, by counsel of the Office of Attorney General, hereby respectfully set forth their answer and defenses to the Complaint for Expedited Declaratory Relief ("Complaint") served on Defendants on or about October 25, 2000.

FIRST DEFENSE

The Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

The Court lacks jurisdiction over certain aspects of the Complaint in that said allegations are not currently ripe for adjudication and do not demonstrate a genuine threat of enforcement against Plaintiffs at present.

THIRD DEFENSE

A complaint for a declaratory judgment is a demand for a final judgment and proceedings regarding same cannot be so "expedited" so as to violate or omit defendants' procedural and substantive rights set forth in the Federal Rules of Civil Procedure.

FOURTH DEFENSE

The Court upon full and mature consideration should issue a declaratory judgment in favor of Defendants that the Plaintiff Chamber's ads constitute express advocacy in support of clearly identified candidates and that upon current proof at a minimum the Chamber's ads and expenditures for same are subject to the reporting and disclosure requirements of Miss. Code Ann. § 23-15-809.

FIFTH DEFENSE

Defendants answer the numbered paragraphs of the Complaint as follows, to-wit:

1. The Defendants are at this time without exact knowledge or information sufficient to form a belief as to the truth of the averments contained in this paragraph of the Complaint.

2. Admitted.

3. Admitted.

4. Denied.

5. With respect to the averments contained in Paragraph 5, Defendants admit only that there is an actual case or controversy at present only with respect to the question of whether the Plaintiff's judicial election advertisements are in context express advocacy for clearly identified candidates, the expenditures for which are subject to the reporting and disclosure requirements

of Mississippi election laws. MISS. CODE ANN. § 23-15-809. To the extent not admitted, the averments of this paragraph are denied.

6. Admitted.

7. The averments of this paragraph are admitted, with the qualification that Defendants are at this time without exact knowledge or information sufficient to form a belief as to the truth of the averment that the advertisements concerning candidates for judicial office are "independently sponsored" by the Chamber.

8. With respect to the averments contained in this paragraph, Defendants admit only that beginning on or about October 17, 2000, the Chamber through purchased television time caused to be aired television commercials concerning Supreme Court election race candidates Jim Smith, Kay Cobb, Lenore Prather, and Keith Starrett, and that copies of scripts for the advertisements are attached to the Complaint. To the extent not admitted, the remaining characterizations and averments of this paragraph are denied.

9. The Defendants are at this time without exact knowledge or information sufficient to form a belief as to the truth of the averments contained in this paragraph of the Complaint.

10. Denied.

11. It is admitted that on October 19, Secretary Clark wrote a letter to General Moore, the terms of which speak for themselves as set forth in the letter as an exhibit to the Complaint.

12. The first and second sentences of the paragraph are admitted. The remainder of the paragraph is denied, in that Plaintiff's counsel were advised that the Attorney General Office's legal research would continue, that no

decision to seek any kind of legal remedy had been made, that Plaintiff's counsel would be given advance notice and opportunity for discussion prior to the filing of any legal action seeking an injunction, and in fact the Attorney General's Office had determined prior to the filing of Plaintiff's suit not to file for an injunction or seek other penalties for any *contribution* violations in view of a lack of proof of coordination or consultation between the Chamber's ads and the candidates at the time, although reporting and disclosure requirements for independent expenditures remained under consideration.

13. With respect to the second sentence of Paragraph 13, the averments are admitted. The remaining averments are denied.

14. Denied.

15. With respect to the averments of this paragraph, Defendants admit the second sentence, qualifiedly admit the first sentence, and deny the third sentence.

16. With respect to the allegations contained in this paragraph, Defendants deny same for the reasons set forth in the Second Defense above, in that at present Defendants lack sufficient proof of any coordination or consultation between the Chamber and the judicial candidates' campaigns regarding the ads and the expenditures for same so as to constitute a "contribution" for purposes of statutory limitations and prohibitions or possible injunctive relief as to same. Accordingly, the allegations of this paragraph are not ripe for disposition nor is there a genuine threat of enforcement at this time.

17. Denied.

18. Denied, for the reasons set forth in response to Paragraph 16 above.

WHEREFORE, Defendants request that the Court deny all declaratory relief sought by Plaintiff Chamber of Commerce in subparagraphs (1), (2), and (3), and further deny that the Court upon full and mature consideration of the matter issue a declaratory judgment in favor of Defendants that the Chamber's advertisements are express advocacy for the election of clearly identified candidates which are, under current proof, at a minimum subject to the disclosure and reporting requirements of Miss. Code Ann. § 23-15-809. Defendants accordingly pray that the Plaintiff's Complaint will be dismissed and for general relief as may seem appropriate.

Respectfully submitted,

MIKE MOORE, Attorney General
ERIC CLARK, Secretary of State
State of Mississippi, Defendants

BY /s/ T. Hunt Cole Jr.
T. HUNT COLE, JR., MSB NO. 6349
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CERTIFICATE OF SERVICE

I, T. Hunt Cole, Jr., Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this date caused to be hand delivered a true and correct copy of the above Answer and Defenses to the following:

MICHAEL B. WALLACE, Esq.
CHRISTOPHER R. GREEN, Esq.
200 S. Lamar Street
Jackson, MS 39201

This the _____ day of October, 2000.

/s/ T. Hunt Cole, Jr.
T. HUNT COLE, JR.

Supreme Court, U.S.
FILED
OCT 7 2002
CLERK

No. 02-305

IN THE

Supreme Court of the United States

MIKE MOORE, Attorney General of the State of Mississippi and ERIC CLARK, Secretary of State of the State of Mississippi,

Petitioners,

v.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED

1. Whether this Court's time-tested, objective, bright-line "express advocacy" standard that defines what political speech may be regulated by campaign finance laws should be replaced by a broad, subjective, and ambiguous standard that would put the political speaker at the mercy of the varied understandings of hearers.

2. Whether any new constitutional standard, were one to be adopted, would change the construction of Mississippi's campaign finance statute, which explicitly adopts the "express advocacy" standard.

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America was incorporated in the District of Columbia in 1916. It is a non-profit, non-stock corporation, exempt from taxation under I.R.C. § 501(c)(6).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	v
COUNTERSTATEMENT OF THE CASE	1
Legal Overview	1
Background and Trial Court Proceedings	2
The Fifth Circuit Decision	4
REASONS FOR DENYING THE WRIT	6
SUMMARY OF ARGUMENT	6
I. THE FIFTH CIRCUIT CORRECTLY READ *BUCKLEY* AND *MCFL* TO REQUIRE EXPLICIT WORDS OF EXPRESS ADVOCACY	10
II. EVERY FEDERAL COURT OF APPEALS TO CONSTRUE BOTH *BUCKLEY* AND *MCFL* HAS REACHED THE SAME CONCLUSION AS THE FIFTH CIRCUIT DID HERE	13
III. THE STATE COURTS DO NOT REQUIRE CORRECTION	18
IV. EVEN IF THE COURT WERE INCLINED TO ADOPT A NEW STANDARD, THIS CASE PRESENTS A POOR VEHICLE FOR SUCH AN UNDERTAKING	22
A. These Petitioners offer a hopelessly broad, subjective and ambiguous alternative standard	22

TABLE OF CONTENTS—Continued

Page

B. A new constitutional standard adopted by this Court would not alter Mississippi's statute, which embodies the *Buckley* express advocacy standard 25

V. THIS CASE WOULD NOT BE A USEFUL COMPANION TO NEXT YEAR'S DIRECT APPEAL OF CONSTITUTIONAL CHALLENGES TO THE NEW FEDERAL CAMPAIGN FINANCE LEGISLATION 26

A. This case cannot be consolidated with the *McConnell* case in a manner consistent with this Court's practice 28

B. Judicial economy is not furthered by considering this case with the *McConnell* case 28

CONCLUSION 30

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Bartlett v. Perry, 532 U.S. 905 (2001) 9
Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*
Chamber of Commerce v. Landrum, No. 2000-CA-02048-SCT (Miss. Feb. 7, 2002), *petition for cert. filed*, 5/20/2002 U.S.L.W.D. d10 (U.S. May 8, 2002) (No. 01-1649) 9
Chamber of Commerce v. Vollor, 532 U.S. 1058 (2001) 9
Citizens for Responsible Government State PAC v. Davidson, 236 F.3d 1174 (10th Cir. 2000) 2, 11
Faucher v. FEC, 928 F.2d 468 (1st Cir. 1991) 2, 11
FEC v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45 (2d Cir. 1980) 2, 11, 18
FEC v. Christian Action Network, Inc., 110 F.3d 1049 (4th Cir. 1997) 2, 11, 17
FEC v. Furgatch, 807 F.2d 857 (9th Cir. 1987) .... *passim*
FEC v. Keefer, 502 U.S. 820 (1991) 9
FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) ..... *passim*
FEC v. Massachusetts Citizens for Life, Inc., 589 F. Supp. 646 (D. Mass. 1984) 14
FEC v. Massachusetts Citizens for Life, Inc., 769 F.2d 13 (1st Cir. 1985) 14
FEC v. Maine Right to Life Committee, Inc., 522 U.S. 810 (1997) 9
FEC v. National Organization for Women, 713 F. Supp. 428 (D.D.C. 1989) 18
Florida Right to Life, Inc. v. Lamar, 238 F.3d 1288 (11th Cir. 2001) 2, 11
Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246 (1994) 28

TABLE OF AUTHORITIES—Continued

Page

Iowa Right to Life Committee, Inc. v. Williams, 187 F.3d 963 (8th Cir. 1999) 2, 11
Maine Right to Life Committee, Inc. v. FEC, 914 F. Supp. 8 (D. Me. 1996) 17
Maine Right to Life Committee, Inc. v. FEC, 98 F.3d 1 (1st Cir. 1996) 2, 11, 17
McConnell v. FEC, No. 02-582 (D.D.C. filed Mar. 27, 2002) ..... *passim*
North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705 (4th Cir. 1999) 2, 11
North Carolina Right to Life, Inc. v. Bartlett, 528 U.S. 1153 (2000) 9
National Federation of Republican Assemblies v. United States, No. CIV.A.00-0759-RV-C, 2002 WL 2008245 (S.D. Ala. Aug. 27, 2002) ... 18
Perry v. Bartlett, 231 F.3d 155 (4th Cir. 2000), *cert. denied*, 532 U.S. 905 (2001) 2, 11
United States v. Eichman, 496 U.S. 310 (1990) 28
Virginia Society for Human Life, Inc. v. FEC, 263 F.3d 379 (4th Cir. 2001) 2, 10, 17
Virginia Society for Human Life, Inc. v. Caldwell, 152 F.3d 268 (4th Cir. 1998) 2, 11
Vermont Right to Life Committee, Inc. v. Sorrell, 19 F. Supp. 2d 204 (D. Vt. 1998) 11
Vermont Right to Life Committee, Inc. v. Sorrell, 221 F.3d 376 (2d Cir. 2000) 2, 11

STATE CASES

Brownsburg Area Patrons Affecting Change v. Baldwin, 714 N.E.2d 135 (Ind. 1999) 19
Connecticut v. Proto, 526 A.2d 1297 (Conn. 1987) 19
Doe v. Mortham, 708 So.2d 929 (Fla. 1998) 19

TABLE OF AUTHORITIES—Continued

Page

Elections Board of Wisconsin v. Wisconsin Manufacturers & Commerce, 597 N.W.2d 721 (Wisc. 1999) 20

Governor Gray Davis Committee v. American Taxpayers Alliance, No. A096658, 2002 WL 31116829 (Cal. App. 1 Dist. Sept. 25, 2002) 19, 20

Osterberg v. Peca, 12 S.W.3d 31 (Tex. 2000), *cert. denied*, 530 U.S. 1244 (2000) 20, 21

State ex rel. Crumpton v. Keisling, 982 P.2d 3 (Or. Ct. App. 1999) 21

Virginia Society For Human Life, Inc. v. Caldwell, 500 S.E.2d 814 (Va. 1998) 19

Washington State Republican Party v. Washington State Public Disclosure Commission, 4 P.3d 808 (Wash. 2000) 19

FEDERAL STATUTES

2 U.S.C. § 431(17) 28

2 U.S.C. § 434 27

2 U.S.C. § 437h 8

Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 83 (2002) ..... *passim*

I.R.C. § 501(c)(6) ii

STATE STATUTES

1986 Miss. Laws 495 ..... 3, 26

Or. Rev. Stat. § 260.044(1) 21

FEDERAL REGULATIONS

11 C.F.R. § 109.1(d)(1) 23

OTHER AUTHORITIES

Anthony Corrado, *On the Issue of Issue Advocacy: A Comment*, 85 Va. L. Rev. 1803 (1999) 25

TABLE OF AUTHORITIES—Continued

Page

Bipartisan Campaign Reform Act of 2002, Election Law News (Wiley Rein & Fielding LLP, Washington, D.C.) Mar. 27, 2002 27

Glenn J. Moramarco, *Beyond "Magic Words": Using Self-Disclosure to Regulate Electioneering*, 49 Cath. U. L. Rev. 107 (1999) 25

Richard E. Levy, *Defining Express Advocacy for Purposes of Campaign Finance Reporting and Disclosure Laws*, 8 Kan. J.L. & Pub. Pol'y 90 (1999) 25

Scott E. Thomas & Jeffrey H. Bowman, *Is Soft Money Here to Stay Under the "Magic Words" Doctrine?*, 10 Stan. L. & Pol'y Rev. 33, 35 (1998) 25

COUNTERSTATEMENT OF THE CASE

Legal Overview

In 1976 this Court held that the First Amendment limits campaign finance laws to regulating independent expenditures for speech that contains "explicit words" to "expressly advocate" the election or defeat of clearly identified candidates. *Buckley v. Valeo*, 424 U.S. 1, 43-44, 80 (1976). Examples of "express words of advocacy of election or defeat" include "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," or "reject." *Id.* at 44 n.52.

The Court grounded its holding on both the need for precision and certainty of regulation and the imperative of preventing overbroad regulation of political speech. *Id.* at 41-44, 79-80. The Court made no pretense that the "express advocacy" standard would reach all speech that was intended to influence elections. To the contrary, it held that speech subjectively intended to influence elections must be protected unless explicit words of express advocacy are employed. "So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, *they are free to spend as much as they want to promote the candidate and his views.*" *Id.* at 45 (emphasis added).

A decade later, this Court specifically reaffirmed the requirement of "explicit" words of "express" advocacy. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) ("*MCFL*"). The Court distinguished between the requirement that advocacy be "explicit" and "express" and the element of directness. *Id.* at 249. It held that a communication stating "vote pro-life" followed by a list of clearly identified candidates who were described as "pro-life" was "marginally less direct" than the *Buckley* examples, but did not defeat the "essential nature" of explicit and express advocacy. *Id.* at 243, 249.

Every federal court of appeals to discuss the holdings of both *Buckley* and *MCFL* has held that they mean just what they say, requiring "explicit" words of "express" advocacy.[1] The Fifth Circuit here joined that unanimous view.

Background and Trial Court Proceedings

The November 7, 2000, Mississippi elections included races for four seats on the state Supreme Court. Respondent Chamber of Commerce of the United States ("Chamber"), a non-profit organization that represents business interests in dealing with all branches and phases of government, produced four television advertisements that aired during the three weeks before the election. These four advertisements separately addressed issues and the background and philosophy of each candidate, but did not mention an election or contain any explicit words advocating electoral action.

Shortly after the Chamber began running its ads, Mississippi Secretary of State Eric Clark wrote to Mississippi Attorney General Michael Moore asking him to take action against the Chamber's ads under Mississippi's election statutes. Faced with perceived civil and criminal exposure, and seeking to clarify its legal obligations, the Chamber brought a declaratory judgment action in the United States

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[1] *See Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999); *Me. Right to Life Comm., Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996). *See also Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000), *cert. denied*, 532 U.S. 905 (2001); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999); *Va. Soc'y for Human Life, Inc. v. Caldwell*, 152 F.3d 268 (4th Cir. 1998); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997); *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991); *see also FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980; *Fla. Right to Life, Inc. v. Lamar*, 238 F.3d 1288 (11th Cir. 2001) (affirming preliminary injunction).

District Court for the Southern District of Mississippi, naming Petitioners, Attorney General Moore and Secretary of State Clark, as defendants. It sought a declaration that the Chamber's ads did not include "express advocacy" and, hence, were not subject to Mississippi election statutes. Petitioners argued in response that Mississippi election law applied, because the Chamber's ads "expressly advocate the election of the favored candidates for the four Mississippi Supreme Court seats" (Pet. App. at 21a), and thus were "'independent expenditures' subject to the reporting requirements" of Mississippi law (Pet. App. at 23a).

The "express advocacy" test had been written into Mississippi law in early 1986.[2] Since it was adopted before *MCFL* was decided, the presumed intent was to incorporate the *Buckley* standard. All parties recognized that this statute was intended to adopt the *Buckley* holding. (Pet. at 10-11).

On November 2, 2000, the district court issued a Memorandum Opinion and Order in the Chamber's declaratory judgment action. The opinion explained that the Chamber's ads were independent speech, there being "no proof whatsoever of any collaboration between the Chamber and the candidates involved in the advertisements" (Pet. App. at 21a). The district court also did not find any explicit language advocating electoral action. The court's descriptions of the ads appear in the Petition Appendix at 25a-27a. Nevertheless, the district court concluded that the Chamber advertisements "offer thinly veiled exhortations to support the campaigns of the aforesaid candidates, a plain, clever attempt to avoid the reach of Mississippi reporting and disclosure laws by eliminating those words listed at footnote 52 of *Buckley*." (Pet. App. at 44a).

The district court recognized that every federal court of appeals to construe both *Buckley* and *MCFL* had read them to

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[2] 1986 Miss. Laws 495 (enacted Apr. 16, 1986).

mean what they said—only "explicit" language of "express advocacy" may be regulated. However, the district court concluded that, when *MCFL* held that the use of two statements that combined to explicitly advocate a vote did not alter the "essential nature" of the express advocacy, the Court had adopted a new "essential nature" standard under which implied messages could be deemed express. (Pet. App. at 42a). Ironically, the court bolstered this conclusion by reference to a Ninth Circuit opinion that had overlooked *MCFL* entirely in construing *Buckley*. *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). (Pet. App. at 34a-36a, 42a). Using that analytic framework, the district court concluded that the ads "expressly advocate" the election of the named candidates, and, consequently, that the Chamber was subject to Mississippi's campaign finance laws. (Pet. App. at 44a). The Chamber appealed the district court decision to the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit Decision

The court of appeals unanimously reversed the district court. It rejected the lower court's claim that this Court's *MCFL* opinion altered *Buckley*'s express advocacy standard. It also held that the district court's attempt to base a standard on *Furgatch*—an opinion that had overlooked *MCFL*—was inconsistent with this Court's decisions in *Buckley* and *MCFL*, as well as subsequent courts of appeals decisions, which it deemed to provide "a well worn path" requiring "words that *explicitly* advocate the election or defeat of a particular candidate." (Pet. App. at 4a). It held that the district court's approach violated *Buckley*'s express holding and defeated "*Buckley*'s emphasis on (1) the need for a bright-line rule demarcating the government's authority to regulate speech and (2) the need to ensure that regulation does not impinge on protected issue advocacy." (Pet. App. at 7a).

The district court's standard was found to introduce "two elements not present in the limited inquiry endorsed by the

other circuits: (1) 'limited reference' to the context of the communication and (2) reference to whether 'reasonable minds' could differ about the meaning of the communication." (Pet. App. at 9a). Agreeing with other circuits, the Fifth Circuit held that "the *Furgatch* test is too vague and reaches too broad an array of speech to be consistent with the First Amendment." (Pet. App. at 10a). The district court test violated *Buckley*'s mandate that the speaker not be left "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent or meaning." 424 U.S. at 43. The Fifth Circuit understood that, to "avoid this result, the [Supreme] Court emphasized the need for a clear line between regulated and unregulated speech." (Pet. App. at 11a). Accordingly, the Fifth Circuit held that *Buckley* means just what it says; a "communication constitutes 'express advocacy'—and may therefore be subject to mandatory disclosure regulations—only if it contains explicit words advocating the election or defeat of a clearly identified candidate." (Pet. App. at 12a).

The court of appeals then held that the Chamber advertisements at issue "do not constitute 'express advocacy' under the bright line approach adopted above," because the "Chamber's advertisements do not contain explicit words exhorting viewers to take specific electoral action for or against the featured candidates." (Pet. App. at 17a). The court of appeals rejected Petitioners' arguments that a number of ad attributes or contextual factors could appropriately be substituted for the undisputed absence of any explicit words exhorting viewers to take specific electoral action. Those proposed substitutes included the fact that the Chamber's advertisements contained "references to positive attributes of specific candidates" (Pet. App. at 13a), were "aired on the eve of the elections" (Pet. App. at 14a), or were "virtually identical to the candidates' own advertisements—except they omit the phrase 'vote for [the featured candidate]" (Pet. App.

at 14a).[3] The court of appeals rejected such contentions on the grounds that "communications that discuss in glowing terms the record and philosophy of specific candidates" do not constitute express advocacy "unless they also contain words that exhort viewers to take specific electoral action for or against the candidates" (Pet. App. at 14a), and "contextual factors" such as date of broadcast or similarity to other ads "are irrelevant to our determination whether the advertisements contain express advocacy" (Pet. App. at 15a).

Accordingly, the court of appeals held that "the First Amendment protects the Chamber's advertisements, and consequently the advertisements are not subject to regulation under the Mississippi election statute." (Pet. App. at 17a-18a). It reversed the judgment of the district court and remanded for entry of judgment in the Chamber's favor. (Pet. App. at 18a). Petitioners' subsequent request for rehearing en banc was denied. (Pet. App. at 47a).

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

There is no reason for this Court to grant review.

1. There is no split among the circuits. To the contrary, every court of appeals to construe both the *Buckley* and

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[3] This latter assertion—that the Chamber's ads were "virtually identical" to the candidates' ads—simply is not accurate. The district court made the assertion, but did not explain the contents of the candidates' ads. The Petitioners have similarly failed to do so in their submission to this Court. The ads are not "virtually identical," which is a subjective standard to begin with. If it mattered legally, and it does not, the Chamber urges the Court to compare the Chamber ads proffered by the Petition (at 6, 52a, 53a, 54a) with the candidate ads that were made part of the record below (Oct. 30, 2000, Hr'g Tr. at 24 (candidate ads received by the district court and marked as D-1 for identification)). Moreover, the Chamber's ads were not coordinated with any candidate or party. (Pet. App. at 21a).

MCFL decisions has reached the same conclusion—that when this Court specified explicit words of express advocacy, it meant just that. The differing Ninth Circuit opinion, *Furgatch*, overlooked the then just-decided *MCFL* opinion. *Furgatch* was out-of-date when it issued. It has not been followed by any of the other circuits or, for that matter, by any subsequent Ninth Circuit opinion.

2. There is no tension between the Fifth Circuit decision and this Court's *MCFL* ruling. To the contrary, the Fifth Circuit carefully followed the precise holdings of *MCFL*. The district court's belief that *MCFL* adopted a newer and broader "essential nature" test was mistaken. *MCFL* held that putting explicit words of advocacy into two phrases, rather than one, makes them "marginally less direct" but does not change their "essential nature" as explicit and express advocacy. It did not adopt a new "essential nature" test. No circuit ever has read *MCFL* to accept something less than explicit and express advocacy.

3. State courts do not require further guidance. No state supreme court actually has rejected the standard reading of *Buckley* and followed *Furgatch*. Many state courts have followed the standard reading of *Buckley*. Moreover, with increasing numbers of strong and consistent opinions from more circuits, there is no reason to believe that future state courts will reject the view that this Court meant what it said in *Buckley* and *MCFL*. Just days ago, a California court correctly adopted the same standard as the Fifth Circuit here.

4. There is no reason for this Court to reconsider the requirement of explicit words of express advocacy that it formulated in *Buckley,* and reaffirmed in *MCFL*, which has been carefully followed by the federal and state courts. Nor, if the Court were inclined to reconsider, would this case be the proper vehicle. The Petitioners here offer only a broad, subjective and ambiguous alternative standard that flies squarely in the face of *Buckley*'s objective of not holding

political speakers at the mercy of their viewers' interpretations. Petitioners offer no meaningful justification for such a dramatic change in First Amendment philosophy. Additionally, Petitioners fail to recognize that their own authority is limited by the *Buckley* language in the Mississippi statute. Relaxing the constitutional standard would not change the Mississippi legislative standard now in place.

5. The Fifth Circuit opinion does not provide a useful "companion" to the constitutional challenge to the recently enacted Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 83 (2002) ("BCRA"). As the Petition observes, that challenge will arrive at this Court by direct appeal some time next year. *See McConnell v. FEC*, No. 02-582 (D.D.C. filed Mar. 27, 2002) (complaint filed in consolidated challenge before three-judge panel).[4] In the BCRA, Congress has attempted to craft a legislative alternative to the express advocacy standard of *Buckley* and *MCFL*. In reviewing Congress' handiwork, this Court can give whatever additional First Amendment guidance it deems appropriate.

This case does not meet this Court's standards for consolidated cases and would only add burden to what already will be a large and complex proceeding. Petitioners' notion that this case will be needed in reviewing *McConnell* to provide a few tangible examples of actual advertisements is unsupportable. The parties in the BCRA challenge are compiling a record that will contain thousands of such ads, including dozens of television and radio ads by the Chamber.[5] Thus,

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[4] Title IV § 403 of the BCRA (to be codified at 2 U.S.C. § 437h) provides for direct appeal to this Court.

[5] Counsel of Record submitting this Opposition is counsel for the Chamber and several other plaintiffs, including Senator Mitch McConnell in the BCRA challenge. During discovery in that case, hundreds of taped "issue" ads have been produced, plus story boards and scripts for thousands of ads, some containing express advocacy and some not. Many of these ads already have been designated as trial exhibits. The Chamber

the Court will have an ample selection of concrete ads to discuss without this case.

For these reasons, the Petition should be denied.[6]

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has designated and intends to offer many of its ads. The three-judge court has issued a scheduling order, *McConnell v. FEC*, No. 02-582 (D.D.C. filed July 26, 2002), setting December 4, 2002, as the date for final arguments.

[6] Although the Chamber previously petitioned this Court for a writ of certiorari regarding express advocacy, *Chamber of Commerce v. Vollor*, 532 U.S. 1058 (2001), the justification for doing so has since been obviated by the issuance of the Fifth Circuit's decision in this case. In that petition, the Chamber sought review of the express advocacy standard in light of the district court's decision, which was the basis upon which state courts in Mississippi were granting ex parte prior restraints on the Chamber's political speech. However, the lower court's decision has since been overturned by the Fifth Circuit. The result has been a return to the status quo standard of express advocacy, as understood by *Buckley* and *MCFL*, which this Court has previously indicated does not warrant review. *E.g. Bartlett v. Perry*, 532 U.S. 905 (2001); *N.C. Right to Life, Inc. v. Bartlett*, 528 U.S. 1153 (2000); *FEC v. Me. Right to Life Comm., Inc.*, 522 U.S. 810 (1997); *FEC v. Keefer*, 502 U.S. 820 (1991).

On May 8, 2002, the Chamber filed a petition for certiorari in *Chamber of Commerce v. Landrum* that arose from the same Chamber advertisements. *Chamber of Commerce v. Landrum*, No. 2000-CA-02048-SCT (Miss. Feb. 7, 2002), *petition for cert. filed*, 5/20/2002 U.S.L.W.D. d10 (U.S. May 8, 2002) (No. 01-1649). However, that petition raised two independent and much different issues: (1) whether a state court's summary order against future political speech violates the First and Fourteenth Amendments, and (2) whether the state court's ruling penalizing the Chamber's exercise of its federal right to petition this Court by curtailing the Chamber's state appellate rights violated the Supremacy Clause of, and the Fourteenth Amendment to, the Constitution. Regardless of whether the *Buckley* express advocacy standard or some other standard limits the outer reach of election laws, the foregoing two issues raised by the Chamber's petition in *Landrum* would remain unaffected and would merit review by this Court.

I. THE FIFTH CIRCUIT CORRECTLY READ *BUCKLEY* AND *MCFL* TO REQUIRE EXPLICIT WORDS OF EXPRESS ADVOCACY.

The decision below correctly followed *Buckley*'s clear holding that, in order to ameliorate vagueness and overbreadth concerns, express advocacy must be limited to "communications that include explicit words of advocacy of election or defeat of a candidate." 424 U.S. at 43. To suggest otherwise, the Petition emphasizes that the court of appeals decision is "narrow" (Pet. at 5, 8, 9, 10, 19), by repeating that word several times.[7] Petitioners thus imply that the Fifth Circuit's decision is somehow more narrow than those of the many other courts of appeals that have followed the bright-line rule of *Buckley* and *MCFL* that prevents regulation of a political advertisement unless it contains "explicit" and "express words of advocacy of election or defeat such as 'vote for,' 'elect,'" and the like. *Buckley*, 424 U.S. 1, 43-44 & n.52 (1976).[8] In fact, the standard adopted by the Fifth Circuit is entirely consistent with the interpretations made by the other courts of appeals,[9] with the exception of the broad language in *Furgatch*.

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[7] The Petition also repeatedly denigrates the Fifth Circuit's decision by characterizing it as adopting a "narrow 'magic words' approach" (Pet. at 3, 9, 10, 17, 18, 21) or "analysis by computer word search" (Pet. at 18-19, 20). Those are not the descriptions of the express advocacy test used by either the Chamber or the Fifth Circuit.

[8] *Buckley*'s footnote 52 explained that explicit words of advocacy include words like "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject." *Id.* at 44 n.52. Because the Chamber's advertisements did not contain any of these words, or any other similarly explicit words of election advocacy, the Fifth Circuit correctly determined that the advertisements were not express advocacy. (Pet. App. at 13a).

[9] *See Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 392 (4th Cir. 2001) ("We are bound by *Buckley* and *MCFL*, which strictly limit the meaning of 'express advocacy'" "to clear words . . . 'such as 'vote

The Fifth Circuit rejected the district court's claim that this Court's *MCFL* opinion altered *Buckley*'s express advocacy standard. It also held that the district court's attempt to base a standard on *Furgatch*—an opinion that overlooked *MCFL*—was inconsistent with this Court's decisions in *Buckley* and *MCFL*, as well as subsequent courts of appeals decisions, which provide "a well worn path" requiring "words that *explicitly* advocate the election or defeat of a particular candidate." (Pet. App. at 4a). It held that the district court's approach violated *Buckley*'s express language and defeated "*Buckley*'s emphasis on (1) the need for a bright-line rule demarcating the government's authority to regulate speech

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for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" (quoting *Buckley*, 424 U.S. at n.52)); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1187 (10th Cir. 2000) (According to *Buckley* and *MCFL*, "communications that do not contain express words advocating the election or defeat of a particular candidate are deemed issue advocacy, which the First Amendment shields from regulation."); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 388 (2d Cir. 2000) ("The regulation of 'communications that impliedly advocate for or against a candidate' would run afoul of the *Buckley* test." (quoting the lower court opinion at 19 F. Supp. 2d 204, 214 (D. Vt. 1998))); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999) ("The Supreme Court has made clear that a 'finding of 'express advocacy' depend[s] upon the use of language such as 'vote for,' 'elect,' 'support,' etc.'" (quoting *Buckley*, 424 U.S. at n.52)); *Faucher v. FEC*, 928 F.2d 468, 470 (1st Cir. 1991) ("Express advocacy is language which 'in express terms advocate[s] the election or defeat of a clearly identified candidate' through the use of such phrases as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' and 'reject.'" (quoting *Buckley*, 424 U.S. at 44 & n.52)). *See also Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000), *cert. denied*, 532 U.S. 905 (2001); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999); *Va. Soc'y for Human Life, Inc. v. Caldwell*, 152 F.3d 268 (4th Cir. 1998); *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997); *Me. Right to Life Comm., Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996); *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980); *see also Fla. Right to Life, Inc. v. Lamar*, 238 F.3d 1288 (11th Cir. 2001) (affirming preliminary injunction).

and (2) the need to ensure that regulation does not impinge on protected issue advocacy." (Pet. App. at 7a).

The district court's standard was found to introduce "two elements not present in the limited inquiry endorsed by the other circuits: (1) 'limited reference' to the context of the communication and (2) reference to whether 'reasonable minds' could differ about the meaning of the communication." (Pet. App. at 9a). Agreeing with other circuits, the Fifth Circuit held that "the *Furgatch* test is too vague and reaches too broad an array of speech to be consistent with the First Amendment." (Pet. App. at 10a). That test violates *Buckley*'s mandate that the speaker not be left "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent or meaning." 424 U.S. at 43. The Fifth Circuit understood that, to "avoid this result, the [Supreme] Court emphasized the need for a clear line between regulated and unregulated speech." (Pet. App. at 11a). Accordingly, the Fifth Circuit held that *Buckley* means just what it says; a "communication constitutes 'express advocacy'—and may therefore be subject to mandatory disclosure regulations—only if it contains explicit words advocating the election or defeat of a clearly identified candidate." (Pet. App. at 12a). Thus, the Fifth Circuit correctly interpreted *Buckley*.[10]

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[10] Fourteen states and the Commonwealth of Puerto Rico, *amici curiae* below, proposed a test for express advocacy that would allow regulation of political speech that contains an "express endorsement" and does not discuss "any issue as a topic worthy of its own attention." The Fifth Circuit rejected this proposal because it involves an impermissible inquiry into what issues are "worthy" of discussion. (Pet. App. at 10a). Furthermore, neither *Buckley* nor *MCFL* adopted a test that would regulate speech that does not include "express terms" of advocacy. (Pet. App. at 10a). For five of the fourteen states, this was a second attempt at broadening the express advocacy standard beyond the bounds set by this Court. Colorado, Florida, Iowa, North Carolina, and Vermont have all recently had campaign finance laws invalidated under the *Buckley*

II. EVERY FEDERAL COURT OF APPEALS TO CONSTRUE BOTH *BUCKLEY* AND *MCFL* HAS REACHED THE SAME CONCLUSION AS THE FIFTH CIRCUIT DID HERE.

The Petition asserts that the decision below is part of an "express split between the Circuits and disagreement among lower federal courts and state courts." (Pet. at 19-21). Only by misconstruing this Court's decisions in *Buckley* and *MCFL*, and by mischaracterizing selected lower federal and state court decisions, can the Petition arrive at such a result. The clear directives of this Court have been followed by every other circuit that has addressed both *Buckley* and *MCFL*. The Petition's argument that there is conflict among the circuits, as well as disagreement among other lower federal courts and state judiciaries, is unfounded, and certiorari cannot be justified on that theory.

This Court affirmed *Buckley*'s express advocacy standard in *MCFL*. 479 U.S. at 248-250.[11] No federal court of appeals has ever read *MCFL* to weaken or otherwise modify *Buckley*'s express advocacy test.[12] However, the Ninth Circuit's

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standard by United States courts of appeals. *See Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Fla. Right to Life, Inc. v. Lamar*, 238 F.3d 1288 (11th Cir. 2001); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999); *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000); *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000).

[11] *MCFL* examined a leaflet that contained the statement "vote pro-life" followed by a statement naming "pro-life" candidates. The Court cited *Buckley*'s express advocacy standard and its footnote 52 to conclude that the language in the leaflet entailed express advocacy of the named candidates. *MCFL* explained that a statement may be "explicit" and "express" without being entirely "direct." Using two statements instead of one made the advocacy "marginally less direct," but did not change its "essential nature" or its "effect" as explicit and express advocacy.

[12] *See supra* note 9. The district court's determination that the "essential nature" phrase in *MCFL* established a new standard is erroneous.

Furgatch opinion caused some confusion. *Furgatch* overlooked the then just-decided *MCFL* opinion and declared that express advocacy need not include explicit words of advocacy, but could be based on a broader examination of political speech to regulate implied advocacy. *Furgatch*, 807 F.2d at 863-64. *MCFL* was issued in mid-December, 1986. *Furgatch* was released in early January, 1987. *Furgatch*—which may well have been finalized and approved before *MCFL* was issued—cites only the First Circuit's *MCFL* opinion and does not even mention, much less discuss, this Court's ruling.

The potential significance of this oversight may be illustrated through consideration of the *MCFL* opinions. The district court in *MCFL* noted that the "FEC has not contended that the publication constituted express advocacy for any of the candidates," and, without substantial analysis, that district court later found that the "election editions were accurate tabulations of all candidates' positions on three public issues espoused by MCFL, without express advocacy of the election of a particular candidate." *FEC v. Mass. Citizens for Life, Inc.*, 589 F. Supp. 646, 648, 651 (D. Mass. 1984).

The First Circuit disagreed and held that the publication did fit within *Buckley*'s definition of express advocacy. *FEC v. Mass. Citizens for Life, Inc.*, 769 F.2d 13, 20 (1st Cir. 1985).[13]

> The *MCFL* Special Election Edition, however, explicitly advocated the election of particular candidates in the

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When the *MCFL* opinion used that language, it was applying the *Buckley* standard, not purporting to adopt a new standard.

[13] In the First Circuit, as in the Supreme Court, the ultimate conclusion was that the statute could not regulate MCFL's publication consistent with the First Amendment. So the findings on express advocacy were not equivalent to findings that the publication could be regulated under the election statutes.

> primary elections and presented photographs of those candidates only. It reminded the reader that "your vote in the primary will make the critical difference in electing pro-life candidates."[5] Thus, the Special Election Edition expressly advocated the election of clearly identified candidates within the meaning of *Buckley*. *Id.*

[5] The disclaimer stating that "this special election edition does not represent an endorsement of any particular candidate" does not negate the expressions of advocacy in the publication.

Id. This analysis did not identify any specific language in the publication that "explicitly advocated the election of particular candidates." Therefore, the *Furgatch* court of appeals could fairly have understood the First Circuit to have based its conclusion on a perception of the publication as a whole. *Furgatch*'s description of the First Circuit decision is consistent with that reading.[14]

The Supreme Court's *MCFL* opinion, however, made clear that the express advocacy analysis must rely on what is expressly said, rather than the perception of readers. The key paragraph in *MCFL* reads as follows:

> *Buckley* adopted the "express advocacy" requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons.

[14] Thus, the Ninth Circuit's opinion stated, 807 F.2d at 861:

> In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* 769 F.2d 13 (1st Cir. 1985), the First Circuit considered an advertisement in which an anti-abortion group published a "Special Election Edition" of its newsletter which contained photographs of candidates identified as "pro-life." The publication included at least two exhortations to "vote pro-life" and the statement: "Your vote in the primary will make the critical difference in electing pro-life candidates." The court ruled that the "Special Election Edition ... explicitly advocated the election of particular candidates in the primary elections and presented photographs of those candidates only," and thus fell within the FEC's regulatory sphere.

> We therefore concluded in that case that *a finding of "express advocacy" depended upon the use of language* such as "vote for," "elect," "support," etc., *Buckley, supra*, at 44, n. 52, 96 S.Ct., at 646, n. 52. Just such an exhortation appears in the "Special Edition." *The publication not only urges voters to vote for "pro-life" candidates, but also identifies and provides photographs of specific candidates fitting that description.* The Edition cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature. The Edition goes beyond issue discussion to express electoral advocacy. The disclaimer of endorsement cannot negate this fact. The "Special Edition" thus falls squarely within § 441b, for it represents express advocacy of the election of particular candidates distributed to members of the general public.

479 U.S. at 249-250 (emphasis added). Thus, the Court made explicit that, under the *Buckley* standard, "a finding of express advocacy depended on the use of language" by the speaker such as "vote for," etc. It then stated the language that the MCFL publication contained that constituted express advocacy (*i.e.*, "vote for 'pro-life' candidates" plus "identifies and provides photographs of specific candidates"). It then approved reliance on speaker language in several different places to construct the express advocacy, even though that sort of representation by the speaker is "marginally less direct" than "Vote for Smith." Thus, the *MCFL* decision underscored that the proper analysis focuses on what the speaker says explicitly. By being more explicit and more precise than the First Circuit had been, this Court reaffirmed the need to identify the words that the speaker uses to determine "express advocacy." *MCFL* undercuts any potential inference from the First Circuit opinion that a court may appropriately draw a

conclusion of express advocacy in the absence of an identifiable speaker's words sufficient in and of themselves to constitute such advocacy.

Had the Ninth Circuit in *Furgatch* considered the Supreme Court's *MCFL* decision, it likely would have felt constrained from adopting a standard that relied on the court's "reasonable interpretation" made with "limited reference to external events." 807 F.2d at 864. Certainly, the subsequent courts of appeals decisions that did consider both *Buckley* and *MCFL* all deemed those decisions to preclude the *Furgatch* standard. However, *Furgatch* did not consider the Court's *MCFL* ruling, and hence, lacked the benefit of *MCFL's* explicit reaffirmation of *Buckley's* demand for express advocacy.

Because *Furgatch* overlooked *MCFL*, it was out-of-date before it was issued. Thus, when the losing party in *Furgatch* sought certiorari, the FEC in opposition to certiorari argued that Supreme Court review would serve no useful purpose since *MCFL* had just "discussed the proper application of the express advocacy standard" and *Furgatch* would be limited to its "particular facts." *See FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1054 (4th Cir. 1997) (quoting FEC Opposition to Certiorari in *Furgatch* at 7). The FEC's opposition to certiorari proved prophetic.[15] As noted *supra*, every subsequent United States court of appeals to address the

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[15] The influence of *Furgatch* has been limited further by its subsequent history. The FEC amended its regulations to adopt the *Furgatch* standard for express advocacy. Those regulations were challenged and invalidated in *Maine Right to Life Committee, Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996). That court of appeals adopted the district court's opinion in *Maine Right to Life Committee, Inc. v. FEC*, 914 F. Supp. 8, 13 (D. Me. 1996), holding that the FEC's *Furgatch*-based regulation exceeded its statutory authority, as interpreted by *MCFL*, "because it extends beyond express advocacy." Furthermore, the same FEC regulations were recently challenged and again invalidated by the Court of Appeals for the Fourth Circuit in *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001).

issue—the First, Second, Fourth, Eighth, Tenth, and now, the Fifth Circuit—has given no weight to *Furgatch* and has read *MCFL* and *Buckley* to require explicit words of express advocacy.

The only other federal court case cited by the Petition (at 21) as an example of the supposed conflict over the meaning of express advocacy is the district court decision in *FEC v. National Organization for Women*, 713 F. Supp. 428 (D.D.C. 1989) ("*NOW*"), which predates most of the long string of federal appellate precedent rejecting *Furgatch*.[16] Even so, *NOW* noted that *Furgatch* was in tension with a Second Circuit opinion, *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2d Cir. 1980), that "flatly refused" to regulate "implied advocacy." *Id.* at 434. Because the court in *NOW* determined that the speech in question could not be regulated even under *Furgatch*, the court did not have to choose between the Second and Ninth Circuit tests and did not do so. 713 F. Supp. at 434-35.

Thus, the Fifth Circuit's decision below is another in a long line of federal appellate court decisions following the guidance of the Supreme Court in *Buckley* and *MCFL*. Contrary to the Petition's assertion, there is no split among the circuits regarding the express advocacy standard enunciated in *Buckley* and *MCFL*.

III. THE STATE COURTS DO NOT REQUIRE CORRECTION.

Petitioners cite three state court decisions for the proposition that states are departing from the *Buckley/MCFL*

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[16] Since the Petition was filed, a judge on the federal court for the Southern District of Alabama issued an opinion in which he "parts company" with many of the courts of appeals cited *supra*. *Nat'l Fed'n of Republican Assemblies v. United States*, No. CIV.A.00-0759-RV-C, 2002 WL 2008245, at *16 n.36 (S.D. Ala. Aug. 27, 2002). However, the meaning of express advocacy was not an issue that was before the judge, and, therefore, he did not address it.

standard. As detailed below, those decisions in fact show no such trend. Moreover, the Petition ignores many other state Supreme Court decisions that follow the *Buckley/MCFL* standard. *See, e.g., Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 4 P.3d 808, 821 (Wash. 2000) (following *Buckley*, finding ad protected from regulation, and declaring that *Furgatch*'s approach "is too flexible to be consistent with *Buckley*"); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135, 142 (Ind. 1999) (imposing a narrowing construction on an Indiana statute, following *Buckley*, and construing the statute to reach only expenditures for "communications that in express terms advocate the election or defeat of a clearly identified candidate for office or the victory or defeat of a public question"); *Va. Soc'y For Human Life, Inc. v. Caldwell*, 500 S.E.2d 814, 818 (Va. 1998) (following *Buckley* and narrowing phrase "for the purpose of influencing the outcome of an election" to reach only "groups that expressly advocate the election or defeat of a clearly identified candidate"); *Doe v. Mortham*, 708 So.2d 929, 933 (Fla. 1998) (narrowing statute, expressly per *Buckley*, "to reach only those funds used for communications that expressly advocate the election or defeat of a clearly identified candidate or referendum issue"); and *Connecticut v. Proto*, 526 A.2d 1297, 1311 (Conn. 1987) ("like the court in *Buckley*," narrowing statute "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate").[17]

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[17] After the Petition was filed, the California Court of Appeal announced its political advertising-related decision in *Governor Gray Davis Committee v. American Taxpayers Alliance*, No. A096658, 2002 WL 31116829 (Cal. App. 1 Dist. Sept. 25, 2002). Relying on *Buckley, MCFL* and consistent courts of appeals decisions, including the Fifth Circuit's decision here, the California Court of Appeal rejected the *Furgatch* standard, noting that "*Furgatch* has not found approval or support in other circuits" and that "the court in *Furgatch* never mentions *MCFL* . . . which was decided prior to issuance of its opinion." *Id.* at *11 n.10, 12. It in-

The Petition's reliance on *Elections Board of Wisconsin v. Wisconsin Manufacturers & Commerce*, 597 N.W.2d 721 (Wisc. 1999), (Pet. at 21) is misplaced. That state court opinion surveyed the express advocacy landscape and explained that *Furgatch* had overlooked *MCFL* by adopting a context-based application of the express advocacy standard. Noting that numerous courts have rejected it, the Supreme Court of Wisconsin refused to adopt the *Furgatch* standard and decided the case on grounds other than express advocacy. 597 N.W.2d at 734-37. The court affirmatively addressed application of the express advocacy standard only by making the undisputed point that this Court in *Buckley* and *MCFL* required the presence of "explicit words of advocacy" which are not exhausted by the eight terms listed in *Buckley*'s footnote 52. *Id.* at 737.

Petitioners' reliance on *Osterberg v. Peca*, 12 S.W.3d 31 (Tex. 2000), *cert. denied*, 530 U.S. 1244 (2000), (Pet. at 21) is also misplaced. In that case, the Texas Supreme Court affirmed rulings that an advertisement constituted express advocacy where it identified an incumbent candidate for judicial office and contained the words "BRING THE COURTHOUSE BACK TO THE PEOPLE" and "VOTE FOR HIS OPPONENT." *Id.* at 35. The court did not rely on *Furgatch* in reaching that decision, but instead relied on *Buckley*, *MCFL*, and the quoted language. The advertisers argued that there was other language in the ad that constituted "contradictory pleas for action" and contended that the language in *Furgatch* ("if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy") should control when the ad contains conflicting messages. 12

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validated California election law provisions adopting the *Furgatch* standard and determined that the disputed television advertisement merited First Amendment protection because it did "not contain the express or explicit words of advocacy that are subject to regulation." *Id.* at *14.

S.W.3d at 53. Thus, this was an argument that *Furgatch* can be used to negate the presence of words of express advocacy in an ad. First, the "negate express words" theory has no relevance in the present case, because the Chamber's ads contained no words of express advocacy. Second, and more important, the Texas Supreme Court rejected that *Furgatch*-based argument, and relied instead on that part of *MCFL* finding that contradictory language in the brochure "'cannot negate' the fact that the communication's essential nature was express advocacy." *Id.* at 53 (quoting *MCFL*, 479 U.S. at 249). Thus, the Texas Supreme Court has not rejected the standard reading of *Buckley* and *MCFL*.

Finally, the Petition cites *State ex rel. Crumpton v. Keisling*, 982 P.2d 3 (Or. Ct. App. 1999), in which an intermediate state appellate court adopted *Furgatch*. (Pet. at 21). The *Crumpton* case involved construction of an Oregon disclosure statute. The Oregon Court of Appeals opined that "when a statute that affects speech does not have criminal consequences, the constitutional requirements appear to be significantly less," 928 P.2d at 9, and distinguished *Buckley* because the statute considered there had criminal penalties. It then concluded that, "whether or not the Ninth Circuit's approach in *Furgatch* is correct as to the federal Act with its threat of criminal punishment, it provides a proper foundation for construing the expenditure reporting requirements of ORS 260.044(1), with their limited civil sanctions." *Id.* at 10. If *Crumpton* is wrongly decided, the Oregon Supreme Court no doubt will correct it, but even if valid as a matter of constitutional law, *Crumpton* would have no relevance here, because the subject Mississippi reporting statute does have criminal penalties (Pet. App. at 23a-24a).

Thus, there is no significant disagreement emanating from state supreme courts. Review by this Court is not needed to resolve any such division or to ensure uniformity in decisionmaking.

IV. EVEN IF THE COURT WERE INCLINED TO ADOPT A NEW STANDARD, THIS CASE PRESENTS A POOR VEHICLE FOR SUCH AN UNDERTAKING.

A. These Petitioners offer a hopelessly broad, subjective and ambiguous alternative standard.

Even if this Court were inclined to reconsider or refine the express advocacy test, this case would not present a good vehicle for doing so. The Petitioners advocate a broad, subjective and ambiguous alternative standard that is wholly at odds with *Buckley*'s objective that political speakers not be held at the mercy of their listeners' understanding.

Petitioners' seek to modify the express advocacy standard so that the government could regulate an advertisement utilizing factors other than whether the advertisement contains explicit terms advocating specific electoral action. The alternative criteria Petitioners espouse are that the ads are "election eve television ads," "feature only a specific candidate" and "tout his or her qualifications," "contain a campaign-like slogan," and are "virtual clones of the candidates' own ads." (Pet. at 10).[18] All of these criteria are ambiguous and not intended by Petitioners to be read literally. Thus, an "election eve" ad is not just one run the evening before election day. For example the lower court ruled on November 2, 2000, five days before the election, and referred to broadcasts that had occurred weeks before ruling. (Pet. App. at 19a, 23a). Thus, Petitioners actually have in mind some unspecified timeframe preceding an election, whose dimensions presumably would be determined through hindsight.

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[18] Such standards are repeated throughout the Petition: "election eve" (Pet. at 10, 12, 20, 21), "tout" qualifications (Pet. at 7, 10, 17, 20), "campaign-like slogan" (Pet. at 7, 10, 18, 19, 20), and "virtual clone" (Pet. at 8, 10, 13, 17, 20).

The court of appeals found that the ads "described in general terms the candidates' judicial philosophy, background, qualifications, and other positive qualities." (Pet. App. at 2a).[19] Petitioners assert that such ads "tout his or her qualifications." When speech stops merely "describing" and begins "touting" is a subjective matter that would vary from viewer to viewer.

To categorize as express advocacy ads that "contain a campaign-like slogan" likewise would require subjective viewer judgments. "Campaign-like" in whose view? Below the Petitioners argued that one such campaign-like slogan was, "Lenore Prather—A fair and independent voice for Mississippi," which Petitioners contended was equivalent to the *Buckley* example, "Smith for Congress." The Fifth Circuit rejected that logic, noting that the ad "connects a name to a positive character trait," while "Smith for Congress" connects "a name with an elected office." (Pet. App. at 16a). The court of appeals found that the ad language was "ambiguous." (Pet. App. at 16a). Petitioners do not explain how political speakers can be sure in advance whether some viewers might construe any catchy phrase to be a "campaign-like slogan."

Similarly, the proposed "virtual clone of the candidates' own ads" standard is ambiguous and dependent on viewer perception. It is unclear what "virtual clone" may mean.[20]

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[19] The district court said that they "comment on the backgrounds and qualifications of four candidates." (Pet. App. at 23a).

[20] Under federal law, expenses incurred by third-parties to reproduce and disseminate a candidate's campaign materials are treated as contributions to the candidate. 11 C.F.R. § 109.1(d)(1). Petitioners have not alleged that the Chamber's advertisements constitute such candidate contributions. (Pet. App. at 23a). Nor could they. Notably, neither the district court, nor Petitioners include a transcript of the candidates' ads in their analyses. The fact of the matter is that the candidates' ads and the Chamber's ads have conspicuous differences. Moreover, the Chamber's

Petitioners seem to propose a standard that depends on perceived similarities between the video and audio content of two ads. Such perceived similarities, of course, will vary with the eye of the beholder.[21]

All of Petitioners' proposed criteria would tend to place the political speaker "at the mercy of the varied understanding of his hearers," precisely what the *Buckley* standard sought to avoid. 424 U.S. at 43. Moreover, Petitioners offer no meaningful reason why the Court should adopt such viewer-oriented, subjective standards and impose on political speakers the chilling effects that such standards would produce. Petitioners note only that certain commentators perceive "a dramatic increase in expenditures for purported 'issue ads' from the 1996 election cycle to the 2000 election cycle" (Pet. at 13) and that such growth "has over the past several years become an increasingly important topic for academic discussion and debate in law journals and reviews"[22] (Pet. at

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ads were undertaken independent of any candidate. (Pet. App. at 20a-21a).

[21] Such a viewer impression is reflected in the district court's analysis (Pet. App. at 43a):

> Further, these advertisements are virtually the same as the advertisements being aired by the candidates themselves. The advertisements repeat the touted candidates' names in the very same manner as the candidates own advertisements which exhort the viewing public to vote for the named candidates. In this court's view, a finding of any use of the "magic words" becomes unnecessary when an advertisement clearly champions the election of a particular candidate as the person who will use common sense, ensure prompt adjudication of death penalty cases and uphold victim's rights.

This gives no hint of the court's criteria for measuring sameness other than that the Chamber's "advertisements repeat the touted candidates' names in the very same manner as the candidates own advertisements."

[22] The articles Petitioners cite are not unbiased treatments of the subject, but instead propose methods for circumventing the express advocacy test and opening up political speech to a myriad of regulatory

14-15). Those facts, even if undisputed, show only that there is much political speech and academics are writing about it. The mere fact that speech is widely exercised surely provides no mandate for suppressing rights by narrowing First Amendment protections. Even if there were a proven mandate, the solution would not lie in a broad, subjective and ambiguous standard such as advocated by these Petitioners.

B. A new constitutional standard adopted by this Court would not alter Mississippi's statute, which embodies the *Buckley* express advocacy standard.

Even if this Court were inclined to replace the express advocacy standard with another constitutional standard, such a change would not affect the outcome here. The Mississippi statute was enacted after *Buckley*, but before *MCFL*, and it

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schemes. *See e.g.*, Richard E. Levy, *Defining Express Advocacy for Purposes of Campaign Finance Reporting and Disclosure Laws*, 8 Kan. J.L. & Pub. Pol'y 90 (1999) (arguing that *Buckley* and *MCFL* did not make express advocacy a constitutional requirement but were only providing a statutory interpretation of federal law and minimizing the dangers from nonprofit, noncommercial entities, respectively); Anthony Corrado, *On the Issue of Issue Advocacy: A Comment*, 85 Va. L. Rev. 1803, 1809 (1999) ("[T]he Court in *Buckley* did not argue that disclosure provisions could only be applied to express candidate advocacy. . . . It did not say . . . that the express advocacy test was the only way to ensure that a disclosure requirement is narrowly tailored."); Glenn J. Moramarco, *Beyond "Magic Words": Using Self-Disclosure to Regulate Electioneering*, 49 Cath. U. L. Rev. 107, 126 (1999) ("Since intent is the crucial factor that differentiates electioneering speech from true issue advocacy, a statutory definition of 'electioneering speech' that is based on objective, measurable factors, will never achieve a perfect fit, capturing all and only speech that is intended to influence a vote."); Scott E. Thomas & Jeffrey H. Bowman, *Is Soft Money Here to Stay Under the "Magic Words" Doctrine?*, 10 Stan. L. & Pol'y Rev. 33, 35 (1998) ("The requirement that specific phrases or words . . . must be present in order to find express advocacy creates a gaping loophole in the Act.").

adopted the *Buckley* standard.[23] Therefore, even if this Court were to abandon the *Buckley* standard as a constitutional limit, or find that it was weakened by *MCFL*, as Petitioners urge alternatively, Petitioners would still be bound statutorily by the *Buckley* standard until such future time as the Mississippi legislature might see fit to amend the Mississippi statutes to adopt a new, more inclusive standard.

Thus, review of this case would accomplish less in terms of Petitioners' historical and present authority to regulate political speech than Petitioners suggest. Specifically, it could not change the conclusion that the subject 2000 Chamber ads fell outside the scope of the Mississippi election statutes in 2000.

V. THIS CASE WOULD NOT BE A USEFUL COMPANION TO NEXT YEAR'S DIRECT APPEAL OF CONSTITUTIONAL CHALLENGES TO THE NEW FEDERAL CAMPAIGN FINANCE LEGISLATION.

The Petition also contends that the Writ of Certiorari should be granted because "the instant matter is a particularly appropriate companion case" to *McConnell v. FEC*.[24] (Pet. at 15-17). It is unclear whether Petitioners propose that the Court consolidate this case with *McConnell*, or hear the two cases in the same term. Given the difference between the express advocacy issue raised in this case, and the multitude of other, different issues likely to be raised in *McConnell*, neither suggestion justifies granting review of this case.

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[23] 1986 Miss. Laws 495 (enacted Apr. 16, 1986). The *MCFL* decision was issued on December 15, 1986.

[24] This is the lead case in a proceeding that consolidates eleven separate complaints, many brought by multiple plaintiffs, for disposition by a three-judge panel, in accordance with the BCRA.

The Petition seeks review of the almost three-decades old express advocacy standard as it applies to speech exercised by persons independent of political candidates. The *McConnell* case involves challenges to almost every aspect of the newly enacted BCRA. The BCRA regulates many different political actors and does so by employing a variety of means. For example, the BCRA limits contributions to political parties, restricts the fundraising ability of federal candidates and officeholders, increases contribution limits to political candidates, and restricts corporate and labor union "electioneering communications."[25] The BCRA regulates "electioneering communications" by employing a bright-line standard other than express advocacy. It regulates political speech that "refers" to a candidate based upon its proximity to an election, and not upon whether the speech contains explicit words of advocacy.[26]

The Petition acknowledges that the *McConnell* case "necessarily present[s] a broader array of issues" than raised here. (Pet. at 16). Indeed, the Petition concludes: "On its merits, this case presents a pressing constitutional question that is independent of those in *McConnell* . . . ." (Pet. at 17). These statements belie the Petition's claim (at 16) that "the instant matter is a particularly appropriate companion case" to *McConnell*.

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[25] *See Bipartisan Campaign Reform Act of 2002*, Election Law News (Wiley Rein & Fielding LLP, Washington, D.C.) Mar. 27, 2002, *available at* http://www.wrf.com/db30/cgi-bin/pubs/ElectionLawNews020327.pdf.

[26] An "electioneering communication" is any broadcast, cable, or satellite communication made within 30 days of a primary or 60 days of a general election, that refers to a clearly identified candidate for federal office, and is targeted to the relevant electorate. BCRA § 201 (to be codified at 2 U.S.C. § 434).

A. This case cannot be consolidated with the *McConnell* case in a manner consistent with this Court's practice.

This Court's practice precludes consolidation of this case with *McConnell* because of the stark differences between the two cases. This Court has consolidated cases in the past only when they raise the same narrow substantive issue. *See, e.g.*, *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994) (consolidation of two cases from the Supreme Court of Hawaii addressing federal preemption under the Railway Labor Act); *United States v. Eichman*, 496 U.S. 310 (1990) (consolidation of cases from the United States District Courts for the Western District of Washington and for the District of Columbia regarding the constitutionality of the Flag Protection Act). The case below and the *McConnell* case are similar only in the broadest of terms; they are both First Amendment cases in the political speech context. As explained by the Petition itself, this case addresses a very specific issue, while the *McConnell* case will necessarily cover a broad array of First Amendment issues that do not include reinterpretation of the express advocacy standard.[27] These cases do not address the same statute or even the same legal theory. Therefore, they cannot properly be consolidated, and the Writ of Certiorari cannot be granted based upon that theory.

B. Judicial economy is not furthered by considering this case with the *McConnell* case.

Instead of requesting consolidation, the Petition may simply be suggesting that judicial economy would be served by granting the Writ of Certiorari and hearing the case in the same term as the *McConnell* case. The Petition contends that "comprehensive treatment of election finance issues in this

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[27] BCRA § 211 does not amend the meaning of "expressly advocating the election or defeat of a clearly identified candidate" contained in 2 U.S.C. § 431(17).

term should include this case." (Pet. at 16). Petitioners suggest (at 17) that the Chamber's ads underlying this case "may provide a practical, real world context that is beneficial to the Court's consideration" of the *McConnell* issues.

The Chamber has produced numerous ads to the parties defending the BCRA in the *McConnell* actions, as have many other plaintiffs in those actions. Many of those ads will be used as trial exhibits. Issues about the BCRA will be well formulated by interaction of the *McConnell* parties based on the record developed in those proceedings. *McConnell* will be decided on that basis, not on the basis of the record in this case, a record that the *McConnell* parties have not considered.

This case addresses the express advocacy standard, the application of which has been twice explained by this Court in *Buckley* and *MCFL*, and subsequently has been affirmed by every federal court of appeals to address the two cases. The boundaries of express advocacy are settled law. The constitutionality of the BCRA, which regulates beyond express advocacy, is not settled law. Judicial economy in resolving one group of novel issues cannot be advanced by reviewing another issue that is firmly settled.

Petitioners speculate (at 17) that the *McConnell* case may lead this Court to "re-examine the approach of *Buckley* or change the parameters of the various holdings in *Buckley*," and then contend that "this case should have the benefit of the Court's guidance." Petitioners will have the benefit of the Court's guidance in *McConnell*, just like everyone else, by reading the resulting opinion. The fact that these Petitioners are interested in the potential outcome of some other case simply cannot be sufficient justification for certiorari, or else many thousands of petitioners could qualify on that basis each year.

Finally, the Petition incorrectly assumes that consideration of the express advocacy issue, along with the multitude of

other issues raised in the *McConnell* case, will add clarity to that case. (Pet. at 17). As described *supra*, the *McConnell* case will address recently enacted statutory provisions separate and distinct from the express advocacy standard. More than 80 different parties are either supporting or opposing various provisions of the BCRA in the *McConnell* case. Although some of the issues raised by the *McConnell* parties may overlap among themselves, each party brings with it a different perspective to be considered by the Court. Adding the express advocacy issue, and the attendant twenty-seven years worth of jurisprudence, along with an additional group of parties, would needlessly burden what will inevitably be a very large and complicated case. Therefore, even if it were necessary for this Court to review that standard yet again, and it is not, judicial economy could not be advanced by combining this case with the *McConnell* case.

CONCLUSION

For the above-stated reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

MIKE MOORE, Attorney General of Mississippi, and
ERIC CLARK, Secretary of State of Mississippi,

Petitioners,

v.

CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

BRIEF OF *AMICI CURIAE* STATES OF ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, HAWAII, IOWA, LOUISIANA, MICHIGAN, MINNESOTA, MISSOURI, NEVADA, NORTH CAROLINA, OKLAHOMA, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, AND WYOMING AND THE COMMONWEALTHS OF MASSACHUSETTS, THE NORTHERN MARIANA ISLANDS AND PUERTO RICO IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the First Amendment permits States to classify as "express electoral advocacy," and thereby subject to campaign finance disclosure requirements, thirty-second television advertisements that are entirely devoted to endorsing a candidate's qualifications for office.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI* STATES 1

ARGUMENT 2

1. This Court's Review Is Necessary to Permit States to Enforce Their "Express Advocacy" Statutes 4

2. The First Amendment Question Here, While Related to an Issue in the BCRA Litigation, Is Sufficiently Distinct to Merit Separate Consideration 7

3. Reviewing the Particular Television Advertisements in this Case Will Aid the Court in Evaluating the Constitutionality of BCRA..... 10

a. The Court will benefit from reviewing the as-applied challenge here when also considering the facial challenge to BCRA 10

b. The Court's review of this case will aid in evaluating the alternatives available to Congress when it enacted BCRA 12

CONCLUSION 15

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

Federal Election Comm'n v. Colorado Republican Party Campaign Comm., 533 U.S. 431 (2001) 14

Federal Election Comm'n v. Furgatch, 807 F.2d 857 (9th Cir.), *cert. denied*, 487 U.S. 850 (1987) 2

Federal Election Comm'n v. Mass. Citizens for Life, 479 U.S. 238 (1986) 5, 7, 11

STATUTES

2 U.S.C. § 434 ..... *passim*

OTHER

STERN, ROBERT L., ET AL., SUPREME COURT PRACTICE 311 (8th Ed. 2002) 4

INTEREST OF THE *AMICI* STATES

The States of Arizona, California, Colorado, Connecticut, Florida, Hawaii, Iowa, Louisiana, Michigan, Minnesota, Missouri, Nevada, North Carolina, Oklahoma, Utah, Vermont, Washington, West Virginia, and Wyoming and the Commonwealths of Massachusetts, the Northern Mariana Islands and Puerto Rico ("*amici* States") seek to protect a public interest of first-order importance: the ability to enforce meaningful campaign finance regulations, including disclosure requirements, with respect to unambiguous endorsements of political candidates by corporations, unions, PAC's, and all varieties of other "special-interest" organizations.

Although this Court upheld the constitutionality of disclosure requirements with respect to "express advocacy" of a candidate's election, *Buckley v. Valeo*, 424 U.S. 1, 80-82 (1976) (per curiam), the Fifth Circuit's decision in this case has emasculated such disclosure requirements of any practical effect. The Fifth Circuit adopted a definition of "express advocacy" that requires that a campaign advertisement "contain words that exhort viewers to take specific electoral action for or against [a candidate]." Pet. App. at 14a. This excessively narrow definition would exclude a whole range of unambiguous endorsements of a candidate's election. For example, "Smith is the candidate most qualified to serve" is a form of express advocacy that Smith should win the election, yet it would not qualify as express advocacy under the Fifth Circuit's definition because it lacks "words that exhort voters to take specific electoral action." Organizations wishing to endorse candidates without disclosing the amount (or sources) of their expenditures for these explicit endorsements can easily do so under the Fifth Circuit's definition simply by omitting

any words of exhortation. In this way, the Fifth Circuit's definition renders ineffective a State's effort to require disclosure of expenditures for express electoral endorsements.

The interests of the *amici* States in this case are distinct from the interests of the United States in its defense of the new Bipartisan Campaign Reform Act of 2002 (BCRA). That Act contains a definition of "electioneering communication" that differs from the "express advocacy" standard that this Court articulated in *Buckley,* which many States have enacted into their own campaign finance statutes. (A list of 26 States with statutes that either have been drafted or construed to conform to the "express advocacy" standard is contained in the Appendix to this brief.) Consequently, regardless of this Court's eventual disposition of the BCRA litigation, the *amici* States have a distinct and pressing need for this Court to determine whether the Fifth Circuit – in conflict with *Federal Election Comm'n v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 487 U.S. 850 (1987) – has misconstrued the First Amendment by constraining the States to an unduly restrictive definition of "express advocacy."

ARGUMENT

There is no doubt that this case is worthy of the Court's review. It presents a square conflict on a First Amendment question of great national importance: whether campaign advertisements that explicitly endorse a candidate's qualifications for office may be regulated as "express advocacy" of the candidate's election, even if those advertisements do not contain words of exhortation (*i.e.*,

words "that exhort the viewer to take specific electoral action for or against a particular candidate," Pet. App. at 10a). As the Petition explains, different circuits and state supreme courts would decide the identical facts differently, being at odds with each other concerning the permissible scope of "express advocacy" under the First Amendment. Pet. at 20-21. The undisputed facts of this case, which involve four television advertisements that are devoted exclusively to extolling a particular candidate's qualifications for office, present an ideal record for resolving this important First Amendment question. Moreover, there are no procedural obstacles or difficulties that would make this Court's review of this case problematic.

Thus, the critical question concerning the appropriate disposition of the Petition involves the relationship of this case to the pending litigation over the constitutionality of BCRA, the new federal campaign finance statute. This BCRA litigation is under expedited consideration by the three-judge district court in *McConnell v. Federal Election Commission*, CIV. No. 02-583 (consolidated actions). Because Congress has provided for a direct appeal to this Court in section 403(a)(3) of BCRA, the Court needs to consider whether plenary review of this case would be duplicative of its review of the BCRA litigation. If it is, then the Court should simply hold this case in abeyance pending the ultimate resolution of the BCRA litigation.

For the reasons that follow, however, plenary review of this case would *not* merely duplicate the Court's consideration of the BCRA litigation. Not only is the First Amendment question here distinct – and deserving of its own independent consideration – but also plenary review of this case will aid the Court's consideration of the First Amendment challenges to BCRA. "On occasion a petition

for certiorari may be held . . . until some event takes place that will aid or control the determination of the matter," including "an imminent" decision in a related case, and "[s]uch postponement may come about on the motion of a party or on the Court's own motion." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 311 (8th ed. 2002) (citations omitted). Likewise, two related cases before the Court, even when not consolidated for argument, may be scheduled for argument "in tandem." *Id.* at 683. Consequently, the *amici* States respectfully urge the Court to grant the Petition here and schedule this case for argument in tandem with argument in the BCRA litigation.

1. This Court's Review Is Necessary to Permit States to Enforce Their "Express Advocacy" Statutes.

The Fifth Circuit has adopted an interpretation of the First Amendment that requires the scope of an "express advocacy" statute to be confined so narrowly as to be essentially unenforceable as a practical matter. The Court should grant review to clarify that *Buckley* does not require such an interpretation.

When *Buckley* upheld the constitutionality of a disclosure requirement applicable to "express advocacy," the Court did not contemplate that this disclosure requirement would be essentially meaningless. On the contrary, the Court in *Buckley* upheld a disclosure requirement with respect to the category of "express advocacy" precisely because the Court thought that this disclosure requirement would substantially serve the "informational interest" of voters concerning the identity and extent of a candidate's support or opposition. *Buckley*, 424 U.S. at 81.

The Fifth Circuit thus misconstrued *Buckley* when it squarely ruled: "communications that discuss in glowing terms the record and philosophy of specific candidates, like the advertisements at issue here, do not constitute express advocacy under *Buckley* and *MCFL*[1] unless they *also contain words that exhort viewers to take specific electoral action for or against the candidates*." Pet. App. at 14a (emphasis added). To make its holding even clearer, the court of appeals added: "favorable statements about a candidate do not constitute express advocacy, *even if the statements amount to an endorsement of the candidate*." *Id.* at 16a (emphasis added). Consequently, a whole range of communications that expressly advocate in favor of a candidate's election are excluded from the Fifth Circuit's definition:

> 1. "Chief Justice Smith is the best qualified candidate and deserving to hold this high office."
>
> 2. "Chief Justice Smith has served our State for six years with distinction. Chief Justice Smith is a model of integrity, fairness, and leadership. Chief Justice Smith should sit right where he is for another six years."
>
> 3. 'Chief Justice Smith is everything our State would want in a Chief Justice. We are unqualified in our endorsement."

One can easily imagine additional examples, including any number of slight variations to the advertisements in this

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[1] *Federal Election Comm'n v. Mass. Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*").

case: "Chief Justice Lenore Prather – the best for Mississippi"; "Chief Justice Prather – she's the one for us"; and so forth.

The Fifth Circuit's excessively narrow definition of express advocacy has already started to wreak havoc with the enforcement of campaign finance regulations around the country. For example, in Ohio, the U.S. Chamber of Commerce has broadcast television advertisements comparing the two candidates seeking the same seat on the Ohio Supreme Court. One of these comparative advertisements divides the television screen in half, listing (and announcing) the positive attributes of one candidate and the negative attributes of the other. The advertisement explicitly asks viewers to "compare" the two candidates and concludes by emphasizing that there are "big differences" between the two.[2] Yet, citing the Fifth Circuit's decision in this case, the Chamber of Commerce has argued that its comparative advertisements in Ohio cannot be considered "express advocacy" because they lack words of exhortation synonymous with "vote for" or "vote against." Based on this argument, moreover, the Ohio Elections Commission has held that it cannot enforce that State's campaign finance regulations, including disclosure requirements, with respect to these advertisements, thereby rendering these regulations unenforceable.[3] It

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[2] The storyboard for this comparative advertisement is included in the Appendix to this brief.

[3] Litigation concerning the Chamber's comparative advertisements in Ohio is pending before the Ohio Court of Appeals. *Common Cause/Ohio v. Ohio Elections Commission*, Ohio Court of Appeals, 10th District (Franklin County), No. 02AP-439 (and related cases).

contradicts all common sense to say that an advertisement comparing the qualifications of the two candidates competing for the same office, declaring one to be vastly superior to the other, is *not* "express electoral advocacy" subject to disclosure, but that is precisely what the Chamber of Commerce is now arguing in Ohio based on the reasoning of the Fifth Circuit's decision here. Given the circuit and state court split on the permissible scope of express advocacy under *Buckley*, *see* Pet. at 20-21, similar litigation is occurring or will occur in those States that have drafted or construed statutes to conform to *Buckley's* "express advocacy" standard.

Review of the Fifth Circuit's decision, therefore, is necessary to restore common sense to the concept of "express advocacy" and to permit States to enforce their "express advocacy" statutes with respect to unambiguous endorsements of a candidate's election (whether or not those unambiguous endorsements also include words of exhortation). The Fifth Circuit itself recognized that its decision was "counterintuitive" and contrary to common sense, but felt compelled by *Buckley* to render its nonsensical decision. Pet. App. 17a. This Court, however, never intended the concept of "express advocacy" to be inconsistent with common sense, as the Court readily confirmed in *MCFL*, 479 U.S. at 249.

2. The First Amendment Question Here, While Related to an Issue in the BCRA Litigation, Is Sufficiently Distinct to Merit Separate Consideration.

Although the Court will address First Amendment issues in the BCRA litigation that are similar to the issue in this case, the Court should nevertheless grant review in

this case because Mississippi's "express advocacy" statute is narrower than BCRA.

BCRA contains a new definition of "electioneering communication" that encompasses any television advertisement that identifies a candidate for federal office, occurs within sixty days of a general election (or within thirty days of a primary), and is broadcast to viewers within the electoral territory where the candidate is running for office. BCRA § 201(a) (to be codified at 2 U.S.C. § 434(f)(3)(A)(I)). BCRA also contains a fallback definition of "electioneering communication" in the event that this Court holds the primary definition unconstitutional. The fallback definition embraces any television advertisement that "promotes or supports a candidate or attacks or opposes a candidate . . . (regardless of whether the communication expressly advocates a vote for or against a candidate) and which is also suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." *Id.* (to be codified at 2 U.S.C. § 434(f)(3)(A)(ii)). Both definitions have been challenged as unconstitutional by the plaintiffs in *McConnell*. (The *McConnell* plaintiffs include the U.S. Chamber of Commerce, Respondent here.)

The constitutional challenge to the two definitions of "electioneering communication" in BCRA raises First Amendment questions closely related to the First Amendment question here. BCRA requires disclosure of the amount and sources of expenditures for "electioneering communications," as defined by the Act. BCRA § 201 (to be codified at 2 U.S.C. § 434(f)(2)). Thus, the BCRA case – like this one – involves the task of drawing the line between political advertisements that may be subject to disclosure requirements because they support or oppose

candidates and those issue-discussion messages for which disclosure may not be mandated because they do not discuss candidates. *See Buckley*, 424 U.S. 60-84.

Thus, if this Court upholds the constitutionality of either definition of "electioneering communication" in BCRA, the Fifth Circuit's decision should be vacated and this case remanded for further consideration, because both definitions in BCRA are broader than the "express advocacy" statute that Mississippi seeks to apply to the four unambiguous endorsements of candidates in this case.

If this Court were to invalidate both BCRA definitions, however, review of the Fifth Circuit's decision here becomes even more imperative because the Fifth Circuit's express advocacy standard renders the States and the federal government unable to enforce any meaningful disclosure requirement. Reversal of the Fifth Circuit's decision is necessary to make clear that States may apply their "express advocacy" statutes to unambiguous campaign advertisements like those in this case.

Accordingly, regardless of the result of the BCRA litigation, this Court should grant certiorari – and give plenary consideration of the First Amendment question in this case – in order to review the Fifth Circuit's definition of "express advocacy" and, thus, to resolve the existing lower-court conflict over whether the First Amendment excludes explicit endorsements from the scope of "express advocacy" just because these endorsements lack words of exhortation.

3. Reviewing the Particular Television Advertisements in this Case Will Aid the Court in Evaluating the Constitutionality of BCRA.

Plenary review of this case will also aid this Court in its consideration of BCRA's constitutionality. The BCRA litigation involves a facial challenge to the federal statute without benefit of the statute's application to specific communications, whereas this case has the virtue of being an as-applied challenge to four specific advertisements. The Court's consideration of the First Amendment question here will illuminate the relative merits of the contending positions in the BCRA litigation on the First Amendment issues there. Also, addressing the scope of "express advocacy" under the First Amendment will help evaluate the various legislative options available to Congress when it was considering how to define the category of campaign communications subject to disclosure under BCRA.

a. The Court will benefit from reviewing the as-applied challenge here when also considering the facial challenge to BCRA.

McConnell v. FEC, filed the day BCRA was signed into law, is purely a facial challenge to the validity of the statute. Under the terms of the statute itself, its definition of "electioneering communication" and its related disclosure requirement does not take effect until November 6, 2002, and the FEC is not required to issue regulations implementing these provisions until December 22, 2002. BCRA § 402(c). Thus, no one has yet broadcast a TV advertisement that is subject to disclosure under BCRA nor has the FEC threatened any enforcement action with respect to any particular advertisement. Of necessity,

then, the First Amendment arguments of the plaintiffs in the BCRA litigation will involve hypothetical cases that conceivably could arise under the terms of the statute.

By contrast, this case involves four real-world advertisements that were broadcast in Mississippi during the election campaign of 2000, when four separate seats on the State's supreme court were under contention. The Mississippi Secretary of State and Attorney General specifically contemplated enforcement of the State's disclosure requirements with respect to these advertisements, giving rise to an immediate and concrete need to determine whether the First Amendment immunizes these ads from such disclosure requirements. For all the reasons that the adjudication of constitutional questions works best in the context of specific disputes involving concrete, real-world facts (in contrast to abstract or theoretical propositions involving hypothetical circumstances), a focus on the actual advertisements in this case sharpens and clarifies the First Amendment issue.

The benefits of focusing on the specific advertisements here can carry over into considering the facial challenge to BCRA. Is Congress constitutionally disabled from requiring disclosure with respect to advertisements that contain endorsements of federal candidates in language essentially the same as the endorsements contained in these four advertisements? In *Buckley*, this Court identified "Smith for Congress" as an example of "express advocacy" for which Congress could require disclosure. The four advertisements in this case are essentially the same as "Smith for Congress" for the reasons that the newsletter in *MCFL* is essentially the same as "Vote for Smith." *MCFL*, 479 U.S. at 249. The Fifth Circuit, however, disagreed, as does the Chamber of Commerce. Deciding whether the four

real-world advertisements in this case fall inside or outside of the range of communications equivalent to "Smith for Congress" will help the Court to answer the line-drawing questions that will arise in the BCRA litigation.

b. The Court's review of this case will aid in evaluating the alternatives available to Congress when it enacted BCRA.

When Congress confronted the task of defining the term "electioneering communication" for the purpose of the disclosure requirement in BCRA, Congress faced the need to balance two objectives. First, Congress needed to avoid the problem of vagueness, as this Court described it in *Buckley*. 494 U.S. at 79. Second, Congress needed to avoid enacting an excessively broad definition, as this Court also recognized in *Buckley*. *Id.* at 80.

When this Court articulated the "express advocacy" standard in *Buckley* to avoid constitutional difficulties with the way Congress had previously drafted its disclosure requirement in the Federal Election Campaign Act, it hoped that the "express advocacy" standard would solve both vagueness and overbreadth concerns. Unfortunately, when applied to actual advertisements in subsequent cases, the "express advocacy" standard has presented ambiguities of its own. As is evident from the disagreement and confusion among circuit courts and state supreme courts concerning the proper understanding of the "express advocacy" standard under the First Amendment, this "express advocacy" standard is not self-defining and self-applying. In the hands of some circuits (including the Fifth Circuit here), the "express advocacy" standard has turned into little more than a search for easily omitted

"magic words," and therefore robbed of all practicality, while other lower courts have endeavored to apply the "express advocacy" standard in a workable way. *See* Pet. at 20-21.

When deciding how to write the definition of "electioneering communication" in BCRA, Congress was aware of the conflict and confusion among the lower courts on how to implement the "express advocacy" standard. As a result, Congress decided to adopt a definition that does not depend on the "express advocacy" standard. (This point is true for both the primary definition and the fallback provision.)

When deciding whether it was permissible for Congress to adopt a definition of "electioneering communication" in BCRA that does not turn upon the "express advocacy" standard, it would be helpful if the Court had under review at the same time a case presenting a First Amendment question about the permissible scope of the "express advocacy" standard itself. If there are genuine difficulties in defining the proper contours of the "express advocacy" standard, perhaps those difficulties are good reasons to uphold Congress's alternative approach. Conversely, if this Court can clarify the "express advocacy" standard so that it is both sufficiently precise and sufficiently robust to serve the compelling – and, in *Buckley*, previously recognized – goals underlying the disclosure requirements that Congress had adopted, then perhaps there is less need for an alternative definition. On the other hand, perhaps there are two different ways to define the range of communications subject to such disclosure requirements, one being the "express advocacy" standard and the other being the approach taken in BCRA, with both alternatives being equally permissible under the

First Amendment. *Cf. Federal Election Comm'n v. Colorado Republican Party Campaign Comm.*, 533 U.S. 431, 465 (2001) ("Congress is entitled to its choice" between limiting contributions to parties and limiting coordinated expenditures by parties on behalf of candidates.).

This case, presenting an ideal set of facts for considering the permissible scope of the "express advocacy" standard under the First Amendment, provides this Court with the perfect opportunity to consider the relationship of the "express advocacy" standard to BCRA's definition of "electioneering communication." The Court should therefore schedule argument in this case in tandem with argument in the BCRA litigation. Rather than being merely duplicative, argument in this case will assist in focusing, refining, and illuminating the issues in the BCRA litigation, which otherwise threatens to be diffuse and unwieldy because of its procedural posture as an immediate facial challenge to that statute.

CONCLUSION

For the foregoing reasons, as well as those discussed in the Petition itself, the Court should grant the Petition for a Writ of Certiorari and schedule this case for argument in tandem with the BCRA litigation.

Respectfully submitted,

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October 2002

** Arizona Attorney General Janet Napolitano has recused herself from matters concerning election law applicable to candidates for public office and has delegated her responsibilities in this case to Thomas Prose, Chief Assistant Attorney General.

APPENDIX A

State Statutes Based on "Express Advocacy" Standard

Ariz. Rev. Stat. § 16-901(14)

"Independent expenditure" means an expenditure by a person or political committee, other than a candidate's campaign committee, that **expressly advocates** the election or defeat of a clearly identified candidate, that is made without cooperation or consultation with any candidate or committee or agent of the candidate and that is not made in concert with or at the request or suggestion of a candidate, or any committee or agent of the candidate. . . .

Ark. Code Ann. § 7-6-201(10)

An "independent expenditure" is any expenditure which is not a contribution and: (A) **Expressly advocates** the election or defeat of a clearly identified candidate for office. . . .

Cal. Gov. Code § 82031

"Independent expenditure" means an expenditure made by any person in connection with a communication which **expressly advocates** the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee.

Colo. Rev. Stat. § 1-45-103(7)

"Independent expenditure" means payment of money by any person for the purpose of advocating the election or defeat of a candidate, which expenditure is not controlled by, or coordinated with, any candidate or any agent of such candidate. "Independent expenditure" includes expenditures for political messages which unambiguously refer to any specific public office or candidate for such office, but does not include expenditures made by persons, other than political parties and political committees, in the regular course and scope of their business and political messages sent solely to their members. [This provision was limited to "express advocacy" in *League of Women Voters of Colorado v. Davidson*, 23 P.3d 1266 (App. 2001); *accord Citizens for Responsible Government State PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000).]

Del. Code Ann. tit. 15, § 8002(10)

"Independent expenditure" means any expenditure made by any individual or other person (other than a candidate committee, or a political party) **expressly advocating** the election or defeat of a clearly identified candidate, which is made without cooperation or consultation with any candidate, or any committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate or any committee or agent of such candidate.

Fla. Stat. Ann. § 106.011(5)(a)

"Independent expenditure" means an expenditure by a person for the purpose of advocating the election or defeat of a candidate or the approval or rejection of an issue,

which expenditure is not controlled by, coordinated with, or made upon consultation with, any candidate, political committee, or agent of such candidate or committee. [This provision was limited to "express advocacy" in *Doe v. Mortham*, 708 So.2d 929 (Fla. 1998).]

Idaho Code § 67-6602(g)

"Independent expenditure" means any expenditure by a person for a communication **expressly advocating** the election, passage or defeat of a clearly identified candidate or measure that is not made with the cooperation or with the prior consent of, or in consultation with, or at the consent of, or in consultation with, or at the request of a suggestion of, a candidate or any agent or authorized committee of the candidate or political committee supporting or opposing a measure. As used in this subsection, **"expressly advocating" means any communication containing a message advocating election, passage or defeat including, but not limited to**, the name of the candidate or measure, or expression such as "vote for," "elect," "support," "cast your ballot for," "vote against," "defeat" or "reject."

Ind. Code § 3-9-3-2.5(b)

[Disclosure is required pursuant to this section] whenever a person: (1) makes an expenditure for the purpose of financing communications **expressly advocating** the election or defeat of a clearly identified candidate. . . .

Iowa Code Ann. § 56.13

. . . Any person who makes expenditures or incurs indebtedness, other than incidental expenses incurred in performing volunteer work, to **expressly advocate** the nomination, election, or defeat of a candidate for public office shall notify the appropriate committee and provide necessary information for disclosure reports. . . .

Kan. Stat. Ann. § 25-4150

Every person, other than a candidate or a candidate committee, party committee or political committee, who makes contributions or expenditures, other than by contribution to a candidate or a candidate committee, party committee or political committee, in an aggregate amount of $100 or more within a calendar year shall make statements containing the information required by K.S.A. § 25-4148, and amendments thereto. Such statements shall be filed in the office or offices required so that each such statement is in such office or offices on the day specified in K.S.A. § 25-4148, and amendments thereto. If such contributions are received or expenditures are made to **expressly advocate** the nomination, election or defeat of a clearly identified candidate for state office, other than that of an officer elected on a state-wide basis such statement shall be filed in both the office of the secretary of state and in the office of the county election officer of the county in which the candidate is a resident. If such contributions are received or expenditures are made to **expressly advocate** the nomination, election or defeat of a clearly identified candidate for state-wide office such statement shall be filed only in the office of the secretary of state. If such contributions or expenditures are made to **expressly advocate** the nomination, election or defeat of

a clearly identified candidate for local office such statement shall be filed in the office of the county election officer of the county in which the name of the candidate is on the ballot. Reports made under this section need not be cumulative.

Ky. Rev. St. Ann. §121.015(12)

"Independent expenditure" means the expenditure of money or other things of value for a communication which **expressly advocates** the election or defeat of a clearly identified candidate or slate of candidates, and which is made without any coordination, consultation, or cooperation with any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them, and which is not made in concert with, or at the request or suggestion of any candidate, slate of candidates, campaign committee, or any authorized person acting on behalf of any of them; . . .

Me. Rev. Stat. Ann. § 1019

For the purposes of this section, an independent expenditure is any contribution or expenditure by a person, party committee, political committee or political action committee aggregating in excess of $50 in an election that **expressly advocates** the election or defeat of a clearly identified candidate, other than by contribution to a candidate or a candidate's authorized political committee. Any person, party committee, political committee or political action committee that makes an independent expenditure must file a report with the commission. . . .

Mass. Gen. Laws ch. 55, § 18A

Every individual, group or association not defined as a political committee, who makes an independent expenditure or expenditures in an aggregate amount exceeding one hundred dollars during any calendar year for the purpose of promoting the election or defeat of any candidate or candidates shall file with the director, or with the city or town clerk if such candidate or candidates seek public office at a city or town election, within seven business days after making such independent expenditure or expenditures, on a form prescribed by the director, a report stating the name and address of the individual, group or association making the expenditure or expenditures; the name of the candidate or candidates whose election or defeat the expenditure promoted; the name and address of the person or persons to whom the expenditure or expenditures were made; and the total amount or value; the purpose and the date of the expenditure or expenditures.

For the purposes of this section the term "independent expenditure" shall mean an expenditure by an individual, group, or association not defined as a political committee **expressly advocating** the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or a nonelected political committee organized on behalf of a candidate, or any agent of a candidate and which is not made in concert with, or at the request or suggestion of, any candidate, or any nonelected political committee organized on behalf of a candidate or agent of such candidate.

Minn. Stat. § 10A.01(18)

"Independent expenditure" means an expenditure **expressly advocating** the election or defeat of a clearly identified candidate, if the expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent.

Miss. Code Ann. § 23-15-801(j)

The term "independent expenditure" shall mean an expenditure by a person **expressly advocating** the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate or any authorized committee or agent of such candidate, and which is not made in concert with or at the request or suggestion of any candidate or any authorized committee or agent of such candidate.

Mont. Admin. R. 44.10.323(3)

"Independent expenditure" means an expenditure for communications **expressly advocating** the success or defeat of a candidate or ballot issue which is not made with the cooperation or prior consent of or in consultation with, or at the request or suggestion of, a candidate or political committee or an agent of a candidate or political committee. An independent expenditure shall be reported as provided in ARM 44.10.531.

Nev. Rev. Stat. § 294A.004

"Campaign expenses" and "expenditures" mean:

1. Those expenditures contracted for or made for advertising on television, radio, billboards, posters and in newspapers; and

2. All other expenditures contracted for or made, to **advocate expressly** the election or defeat of a clearly identified candidate or group of candidates . . . .

N.H. Rev. Stat. Ann. § 664:2(XI)

"Independent expenditure" means expenditures by a person, political committee, or other entity **expressly advocating** the election or defeat of a clearly identified candidate which are made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which are not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

N.C. Gen. Stat. § 163-278.6(9a)

The term "independently expend" or "independent expenditure" means an expenditure to support or oppose the nomination or election of one or more clearly identified candidates that is made without consultation or coordination with a candidate or agent of a candidate whose nomination or election the expenditure supports or whose opponent's nomination or election the expenditure opposes. Supporting or opposing the election of clearly identified candidates includes supporting or opposing the candidates of a clearly identified political party. . . .

N.C. Gen. Stat. § 163-278.14A(a)

Either of the following shall be means, but not necessarily the exclusive or conclusive means, of proving that an individual or other entity acted "to support or oppose the nomination or election of one or more clearly identified candidates":

(1) Evidence of financial sponsorship of communications to the general public that use phrases such as "vote for", "reelect", "support", "cast your ballot for", "(name of candidate) for (name of office)", "(name of candidate) in (year)", "vote against", "defeat", "reject", "vote pro-(policy position)" or "vote anti-(policy position)" accompanied by a list of candidates clearly labeled "pro-(policy position)" or "anti-(policy position)", or communications of campaign words or slogans, such as posters, bumper stickers, advertisements, etc., which say "(name of candidate)'s the One", "(name of candidate) '98", "(name of candidate)!", or the names of two candidates joined by a hyphen or slash.

(2) Evidence of financial sponsorship of communications whose essential nature **expresses** electoral **advocacy** to the general public and goes beyond a mere discussion of public issues in that they direct voters to take some action to nominate, elect, or defeat a candidate in an election. If the course of action is unclear, contextual factors such as the language of the communication as a whole, the timing of the communication in relation to events of the day, the distribution of the communication to a significant number of registered voters for that candidate's election, and the cost of the communication may be considered in determining whether the action urged could only be interpreted by a reasonable person as advocating the nomination, election, or defeat of that candidate in that election.

(b) Notwithstanding the provisions of subsection (a) of this section, a communication shall not be subject to regulation as a contribution or expenditure under this Article if it:

(1) Appears in a news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, or magazine, unless those facilities are owned or controlled by any political party, or political committee;

(2) Is distributed by a corporation solely to its stockholders and employees; or

(3) Is distributed by any organization, association, or labor union solely to its members or to subscribers or recipients of its regular publications, or is made available to individuals in response to their request, including through the Internet. [Subsection (2) of § 163-278.14A(a) was held unconstitutional by the U.S. District Court for the Eastern District of North Carolina on the ground that it extended beyond "express advocacy".]

Ohio Rev. Code Ann. § 3517.01(B)(17)

"Independent expenditure" means an expenditure by a person advocating the election or defeat of an identified candidate or candidates, that is not made with the consent of, in coordination, cooperation, or consultation with, or at the request or suggestion of any candidate or candidates or of the campaign committee or agent of the candidate or candidates. [Ohio Admin. Code § 111-302 provides: "A 'Communication advocating election or defeat' means a communication that **includes, but is not limited to**, expressions such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' or 'vote against,' 'defeat,' or 'reject'.]

Okla. Stat. Ann. tit. 74, ch. 62, App., 257:1-1-2

"Independent expenditure" means an expenditure made by a person to **advocate** the election or defeat of a clearly identified candidate, or, taken as a whole and in context, **expressly** urges a particular result in an election, but which is not made to, controlled by, coordinated with, requested by, or made upon consultation with a candidate, committee, treasurer, deputy treasurer or agent of a committee.

Pa. Stat. Ann. § 3246(g)

Every person, other than a political committee or candidate, who makes independent expenditures **expressly advocating** the election or defeat of a clearly identified candidate, or question appearing on the ballot, other than by contribution to a political committee or candidate, in an aggregate amount in excess of one hundred dollars ($100) during a calendar year shall file with the appropriate supervisor, on a form prepared by the Secretary of the Commonwealth, a report which shall include the same information required of a candidate or political committee receiving such a contribution and, additionally, the name of the candidate or question supported or opposed.

Tenn. Code Ann. § 2-19-120(a)

Whenever any person makes an expenditure for the purpose of financing a communication that **expressly advocates** the election or defeat of a clearly identified candidate . . . through any broadcasting station, newspaper, magazine, outdoor advertising facility, poster, yard sign, direct mailing or any other form of general public

political advertising, a disclaimer meeting the requirements of subdivision (a)(1), (2), (3) or (4) shall appear and be presented in a clear and conspicuous manner to give the reader, observer or listener adequate notice of the identity of persons who paid for and, where required, who authorized the communication. . . .

Tex. Elec. Code § 253.062

[This section requires reporting of "direct campaign expenditures," which has been construed by the Texas Supreme Court to be limited to "express advocacy." *Osterberg v. Peca*, 12 S.W.2d 31 (Tex. 2000).]

Utah § 20A-11-901(1)(a)

Whenever any person makes an expenditure for the purpose of financing an advertisement **expressly advocating** the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, the advertisement: . . . if not authorized by a candidate or his campaign committee, shall clearly state the name of the person who paid for the advertisement and state that the advertisement is not authorized by any candidate or candidate's committee.

Vt. Stat. Ann. tit. 17, § 2881

"[P]olitical advertisement" means any communication, including communications published in any newspaper or periodical or broadcast on radio, television or over any public address system, placed on any billboards, outdoor

facilities, buttons or printed material attached to motor vehicles, window displays, posters, cards, pamphlets, leaflets, flyers or other circulars, or in any direct mailing, which expressly or implicitly advocates the success or defeat of a candidate. . . .

Vt. Stat. Ann. tit. 17, § 2882

All political advertisements shall contain the name and address of the person who paid for the advertisement. . . .

[These Vermont sections were held unconstitutional insofar as they encompassed "implied" as well as "express" advocacy. *Vermont Right to Life Committee v. Sorrell*, 221 F.3d 376 (2d Cir. 2000).]

Other Relevant State Statutes

Alaska Stat. § 15.13.135(b)

An individual, group, or nongroup entity who makes independent expenditures for a mass mailing, for distribution of campaign literature of any sort, for a television, radio, newspaper, or magazine advertisement, **or any other communication that supports or opposes a candidate for election to public office**

(1) shall comply with AS 15.13.090; and

(2) shall place the following statement in the mailing, literature, advertisement, or other communication so that it is readily and easily discernible:

This NOTICE TO VOTERS is required by Alaska law. (I/we) certify that this (mailing/literature/advertisement) is not authorized, paid for, or approved by the candidate.

Mich. Comp. Laws Ann. § 169.251

A person, other than a committee, who makes an **independent expenditure,** advocating the election of a candidate or the defeat of a candidate's opponents or the qualification, passage, or defeat of a ballot question, in an amount of $100.01 or more in a calendar year shall file a report of the **independent expenditure,** within 10 days, with the clerk of the county of residence of that person. The report shall be made on an **independent expenditure** report form provided by the secretary of state and shall include the date of the expenditure, a brief description of the nature of the expenditure, the amount, the name and address of the person to whom it was paid, the name and address of the person filing the report, together with the name, address, occupation, employer, and principal place of business of each person who contributed $100.01 or more to the expenditure. The filing official receiving the report shall forward copies, as required, to the appropriate filing officers as described in section 36.

APPENDIX B

The Murphy Pintak Gautier Hudome Agency, Inc.

Client: U.S. Chamber of Commerce

Title: "Cook & Black Compare"

30 Television
Date: October 19, 2000

Spot #: USCC-1063

Video:	Audio:
Blue Box & Red Box next to each other with points appearing in respective boxes as announcer reads.	Music Up & Under ANNOUNCER: Deborah Cook and Tim Black. Compare. Justice Cook is an experienced Ohio Supreme Court Justice. Tim Black is a municipal court judge who's never heard an appeal. On education Deborah Cook has voted to require instructors who are paid actually have to teach. And Justice Cook regularly rules on important death penalty cases. Tim Black has never ruled on a death penalty case but he's ruled on many traffic cases.

Closing board: Deborah Cook & Tim Black Big Differences Learn more: www.LitigationFairness.org Paid for by U.S. Chamber of Commerce	Supreme Court Justice Deborah Cook and Municipal Judge Tim Black. Big differences.

Supreme Court, U.S.
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No. 02-305

IN THE

Supreme Court of the United States

MIKE MOORE, Attorney General of the State of Mississippi and ERIC CLARK, Secretary of State of the State of Mississippi,
Petitioners,

v.

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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13 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
1. The Fifth Circuit And The Ninth Circuit Are In Direct Conflict Over A First Amendment Issue Of National Importance	2
2. State Courts Disagree With The Fifth Circuit's Unduly Narrow Rule Of Express Candidate Advocacy	4
3. The Petitioners Do Not Propose A Novel Or Totally "Subjective" Standard, And The Facts Of This Case Present A Concrete Record Upon Which To Give Needed Clarification To *Buckley* and *MCFL*	6
4. This Case Is Appropriately Considered On Its Merits In The Same Term As The BCRA Case	9
CONCLUSION	9

TABLE OF AUTHORITIES

CASES — Page

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

Governor Gray Davis Committee v. American Taxpayers Alliance, 2002 WL. 31116829 (Cal. App. 1 Dist.) (Sept. 25, 2002) 5

Elections Board of Wisconsin v. Wisconsin Manufacturers &Commerce 597 N.W.2d 721, (Wisc.), *cert. denied*, 528 U.S. 969 (1999) 5

FEC v. Furgatch, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987) 3, 4, 5

FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) ..... *passim*

Osterberg v. Peca, 12 S.W.3d 31 (Tex. 2000) 5

State ex rel Crumpton v. Keisling, 982 P.2d 3 (Or. Ct. App. 1999), *review denied*, 994 P.2d 132 (2000) 5

OTHER MATERIALS

David L. Anstaett, *Express Advocacy and the Collision Between Political Speech and Electoral Integrity: Elections Board v. Wisconsin Manufacturers & Commerce*, 2000 Wis. L. Rev. 1117 (2000) 5

INTRODUCTION

The Respondent's Brief in Opposition offers no persuasive reason why the Fifth Circuit's unduly narrow version of express candidate advocacy under *Buckley*[1] and *MCFL*[2] should not be reviewed by the Court. On the contrary, the Respondent's Brief in Opposition is noteworthy primarily for what it does *not* say.

The Respondent does not—and could not—contend that the recurring issue presented by the Petition is not one of significant public importance[3] for a substantial number of states, see Pet. at 10-15, as they seek to properly apply state reporting and disclosure requirements for expenditures that are in fact "unambiguously campaign related." *Buckley*, 424 U.S. at 81. Twenty-two states and territories have now joined in an amici brief in support of review by this Court, observing, *inter alia*, that the First Amendment question is of "great national importance," Brief of Amici Curiae States at 2, and that the Fifth Circuit's interpretation requires state reporting statutes "to be confined so narrowly as to be essentially unenforceable as a practical matter." *Id.* at 4.

Similarly, the Respondent does not—and could not—challenge the Petitioners' assertion that the last decade has witnessed a dramatic and escalating use of expenditures for sham "issue" ads, unlimited in amount and not even reportable to the public under the Fifth Circuit's formulation, to promote

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[1] *Buckley v. Valeo*, 424 U.S. 1 (1976)

[2] *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986)

[3] Indeed, in its application for attorneys' fees and expenses in the district court and its supporting memorandum, filed July 3, 2002, the Respondent and its attorneys variously assert that this was a "major case that was widely recognized as having nationwide implications . . . ." Mem. at 14, that the Fifth Circuit's "strong" opinion "will have broad future implications for political advertisers," Mem. at 16; and that its suit raised issues of "national scope." Application Ex. 3 at p. 4.

and defeat specific candidates. Pet. at 13-14. It cannot be reasonably disputed that the Fifth Circuit's unduly restrictive approach to express candidate advocacy contributes to that trend of escalation and circumvention. Indeed, Respondent itself views the Fifth Circuit decision as a springboard, claiming in the district court on remand that the Fifth Circuit's "strong opinion" will "have broad future implications for political advertisers." See Note 3, *supra*.

In addition, the Respondent does not--and could not--challenge the Petitioners' assertion that the Fifth Circuit's extreme version of the "magic words" test, on this record, renders state reporting and disclosure requirements meaningless, Pet. at 11-13, nor does it offer any commentary as to why the "First Amendment values" that are served by "opening the basic processes of our . . . election system to public view," *Buckley*, 424 U.S. at 82, are somehow unworthy of any protection or weight. Moreover, Respondent does not contend that the factual record here is not clear for purposes of review. It does not—and could not—contend that there are any jurisdictional or procedural obstacles which could make review of the merits problematical.

As discussed below, the arguments that are posed by Respondent in its Brief in Opposition do not upon inspection undercut any of the remaining points made in the Petition as to why review of the Fifth Circuit's judgment is plainly warranted.

ARGUMENT

1. The Fifth Circuit And The Ninth Circuit Are In Direct Conflict Over A First Amendment Issue Of National Importance.

In its Brief in Opposition, the Respondent contends that there is "no split among the circuits", Opp. at 6-7, and seeks to imply that lower courts are a happy family of one mind with the Fifth Circuit's extreme version of a "magic words"

test for express advocacy. The Fifth Circuit and the Ninth Circuit, however, are in direct conflict. As even a cursory examination of the Fifth Circuit decision reveals, and as the Opposition itself ultimately acknowledges, Opp. at 12, the Fifth Circuit explicitly and unequivocally rejects the Ninth Circuit rule, set forth in *FEC v. Furgatch*, 807 F.2d 857, (9th Cir.), *cert. denied*, 484 U.S. 850 (1987), see App. at 10a, and that constitutes a "split" in the Circuits. Equally important, the Respondent never refutes the proposition that expenditures for these same four pro-candidate, pre-election television ads would be subject to reporting and disclosure in the states of the Ninth Circuit but that such disclosure for the ads may not be required in the states of the Fifth Circuit. This fact means that there is a square conflict in the Circuits on an important question of First Amendment law.

The Respondent asserts that the Petition somehow mischaracterizes the Fifth Circuit's standard for electoral advocacy as "narrow." Opp. at 10-11. The fact of the matter is that the Fifth Circuit opinion itself describes its reading of *Buckley* as "narrow," App. at 12a. Moreover, as acknowledged in the Petition, although several Courts of Appeal have indeed adopted a literal and restrictive "magic words" standard for express candidate advocacy, mainly in the context of facial challenges, no court has ever gone so far as to effectively jettison one of *Buckley* footnote 52's own "magic words" of express candidate advocacy—the use of candidate slogans or catch phrases such as "Smith for Congress"—as did the Fifth Circuit here. App. at 16a. On a record such as that presented here, where the pre-election television ads specifically identify the candidate, specifically name the office for which the candidate is running, and close with a candidate slogan or a catch phrase such as "A fair and independent voice for Mississippi," 51a, or "common sense on the bench," 52a, the Fifth Circuit is currently alone in holding that such explicit endorsements of a candidate cannot amount to express advocacy subject to disclosure

requirements. Respondent's claim that every Court of Appeals has "reached the same conclusion," Opp. at 13-17, is not correct.

Respondent's further argument that *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987), is somehow inconsequential because it did not cite the almost simultaneously rendered decision in *MCFL*, Opp. at 13-17, proves exactly nothing. *Furgatch* remains good law in the Ninth Circuit and will so remain until overruled. There is a direct conflict with the Ninth Circuit as to a proper reading of *Buckley*, upon which *Furgatch* based its analysis. As found by the district court, and contrary to Respondent's contention, the decision in *MCFL*, fairly read, supports the Petitioners' position that the ads in question amount to express advocacy for a specific candidate.

2. State Courts Disagree With The Fifth Circuit's Unduly Narrow Rule Of Express Candidate Advocacy.

The Brief in Opposition asserts that review should be denied because the state courts do not need "guidance" or "require correction." Opp. at 7, 18-21. The fact of the matter is that each of the state court decisions cited by Petitioners in their Petition, Pet. at 21, rejects an unduly narrow "magic words" standard for express advocacy now espoused by the Fifth Circuit. Indeed, as the Brief in Opposition itself confirms, Opp. at 19 n.17, there is growing confusion and division in the state courts, spurred in part by the Fifth Circuit's decision in this case—thus affording an additional practical reason why this Court's review is warranted.

Respondent's current contention that state courts are essentially of one mind with the Fifth Circuit is directly contrary to the analysis of the Fifth Circuit itself and the district court, both of which recognized that there is a division of approach to express candidate advocacy in the state courts, see 8a and 36a.

Respondent claims that in *Elections Board of Wisconsin v. Wisconsin Manufacturers & Commerce*, 597 N.W.2d 721 (Wisc.), *cert. denied*, 528 U.S. 969 (1999), the Wisconsin Supreme Court "refused to adopt the *Furgatch* standard." Opp. at 20. More to the point, however, is that a solid majority of that court, five of the six justices, in separate opinions, clearly rejected the extremely narrow "magic words" standard for express advocacy espoused by the Fifth Circuit and Respondent. These justices all agreed at a minimum that "no particular magic words" are necessary for a communication to constitute express advocacy."[4]

Similarly, in *Osterberg v. Peca*, 12 S.W.3d 31, 53 (Tex. 2000), the Texas Supreme Court, contrary to the position of Respondent and the Fifth Circuit, ruled that the Supreme Court in *MCFL* had moved beyond a rigid, unyielding standard of express candidate advocacy to recognize that an advertisement can amount to express advocacy based on an evaluation of the "essential nature" of an advertisement which goes beyond issue discussion.

Moreover, in *State ex rel Crumpton v. Keisling*, 982 P.2d 3 (Or. Ct. App. 1999), *review denied*, 994 P.2d 132 (2000), the state court directly adopted the *Furgatch* analysis for determining what amounts to express candidate advocacy.

In contrast, and as pointed out by the Opposition at 19 n. 17, other state courts, now relying upon, *inter alia*, the narrow formulation of the Fifth Circuit here, have adopted an absolutist approach to express candidate advocacy. *Eg.*, *Governor Gray Davis Committee v. American Taxpayers*

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[4] *Election Bd. of Wisconsin*, 597 N.W.2d at 731; *Id* at 738 (Bablitch, J., concurring); *Id.* at 739 (Bradley, J., dissenting). For an in depth discussion of this case and its various opinions as a microcosm of the current debate over the express advocacy standard, see David L. Anstaett, *Express Advocacy and the Collision Between Political Speech and Electoral Integrity: Elections Board v. Wisconsin Manufacturers & Commerce*, 2000 Wis.L.Rev. 1117 (2000).

Alliance, 2002 WL 31116829 (Cal. App. 1 Dist.) (Sept. 25, 2002). The *Governor Gray Davis Committee* decision exacerbates the existing conflict because now the State of California faces inconsistent opinions on First Amendment law from two different courts. There is a plain and pressing need for guidance from this Court as to this division of approach to express advocacy.

3. The Petitioners Do Not Propose A Novel Or Totally "Subjective" Standard, And The Facts Of This Case Present A Concrete Record Upon Which To Give Needed Clarification to *Buckley* and *MCFL*.

The Respondent asserts that there is "no reason" for the Court to reconsider express advocacy under *Buckley*, which at bottom it views as rigidly confined to a footnote 52-based computer word search, and incorrectly claims that Petitioners propose a standard of express candidate advocacy that is too "subjective." Opp. at 7, 22-26. On this record, however, the Fifth Circuit's concededly "narrow" interpretation of *Buckley*, 10a, refuses to give any weight whatsoever to important considerations set forth in *Buckley* itself [5] and goes well beyond a fair reading and application of that case and *MCFL*. Indeed, as observed above, the *Buckley* Court recognized that using a candidate slogan or catch phrase such as "Smith for Congress" constitutes express electoral advocacy; by refusing to hold that an ad which identifies the candidate, identifies the office for which the candidate is running, and closes with candidate's name and the slogan "A fair and independent voice for Mississippi" amounts to express advocacy subject to

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[5] In *Buckley*, the Court spoke approvingly of disclosure requirements which would "shed the light of publicity on spending that is unambiguously campaign related." 424 U.S. at 81. The Court in *Buckley* and *MCFL* never could have envisioned that spending for these pre-election, entirely pro candidate television ads here would not be subject to state reporting and disclosure requirements.

disclosure, the Fifth Circuit eviscerates a part of *Buckley* and plainly departs from the "essential nature" analysis required by *MCFL*.

Moreover, contrary to Respondent's assertion, the Petition does not suggest, or need to suggest, a novel or totally "subjective" standard of express candidate advocacy. The plain and unmistakable content of the television advertisements here, taken as a whole and viewed with regard to the *objective and undeniable fact* of an election date set by law, amount to express candidate advocacy supporting and endorsing the specified candidates—even if the ad is somehow "marginally less direct" than, for example, "Vote for Prather." The Respondent's spending here was "unambiguously candidate related," 424 U.S. at 81, and, as the district court confirmed, "*no* reasonable viewer" could construe the ads otherwise, 42a (emphasis supplied), or as a mere discussion of issues which mention a candidate.

The Fifth Circuit's purportedly "objective" formulation favored by Respondent [6] is out of touch with the realities of modern political candidate advertising and would completely exclude from any disclosure unlimited "independent" spending for the most famous examples of candidate promotion in American history. Recent studies have demonstrated that in today's political world, *candidates' own advertisements*, which are by definition designed to mobilize and incite voter support at the polls for the candidate, rarely use the express words "vote for" or "vote against" or synonymous phrases. In the 1998 congressional elections, for example, 96% of the candidates' *own* television advertisements did not

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[6] Indeed, the Fifth Circuit's purportedly objective standard is not as "bright line" as Respondent contends, because there is always room for a semantical debate as to what constitutes the "other" explicit words exhorting voters to take specific electoral action. 13a.

use such phrases.[7] Accordingly, for the Fifth Circuit to absolutely exclude from disclosure unlimited expenditures for pre-election advertisements which omit a literal, verbal exhortation to vote for a candidate not only authorizes easy circumvention of state requirements by labor unions, corporations, and special interest groups, but also ignores the modern reality of candidate advertising. Moreover, Respondent cannot deny that the Fifth Circuit's formulation would exclude from disclosure spending for such direct expressions of endorsement and support for a candidate as "I Like Ike" and "LBJ for the USA," which can serve as the defining touchstone and rallying cry for a candidate's election campaign.

Evaluating the content of the pre-election advertisements here, taken as a whole, is not a "subjective" standard, and the facts of this case aptly demonstrate the problem with the Fifth Circuit's approach. Contrary to Respondent's contention, the Court in the facial challenge in *Buckley* (or in the as-applied challenge in *MCFL*) did not dictate that all common sense be left behind when an advertisement conveys a message that is unambiguously and unmistakably advocating the election of a specific declared candidate.[8]

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[7] See Jonathan S. Krasno and Daniel E. Seltz, *Buying Time: Television Advertising in the 1998 Congressional Elections*, Brennan Center for Justice (2000).

[8] Contrary to Respondent's further contention, Opp. at 25, there would be no need to rewrite Mississippi's statute, or any other state's "express advocacy" statute, to take advantage of a decision from this Court which explains that expenditures for the advertisement at issue here are subject to disclosure consistent with *Buckley* and *MCFL*. Petitioners have sought and continue to seek to apply the Mississippi "express advocacy" and disclosure statutes to the full extent of, and not in a manner narrower than, that permitted by this Court.

4. This Case Is Appropriately Considered On Its Merits In The Same Term As The BCRA Case.

In its Opposition, Respondent contends that this case would not be a good companion for the Court to consider at the same term as its review of the BCRA cases for federal elections. Opp. at 26. The circumstances regarding the two cases are outlined in the Petition at pp. 15-17 and will not be reiterated here. The Brief of Amici Curiae States Arizona, et al., discusses in detail why the merits of this case separately warrant consideration and why the Court will also benefit from considering the cases at the same term. *Id.* at 7-14. In view of the broad implications of the Fifth Circuit decision for states in judicial and other upcoming election races, and the distinct interests of the states in applying their election finance laws, this case on its own merits warrants an immediate grant of certiorari regardless of what other case is on the Court's docket. The similarity of the subject matter and the importance of both plainly indicate that there are certain advantages to considering the two cases on their merits in the same term, whether scheduled for oral argument in "tandem," as appropriately suggested by Amici States, or not.[9] There can be no reasonable argument that an immediate grant of certiorari in this case would serve no purpose, as Respondent seems to urge.

CONCLUSION

In the facial challenge in *Buckley*, and even in *MCFL*, now decided over fifteen years ago, the Court could not have envisioned today's state of affairs in which unlimited "independent" expenditures for advertisements that are entirely devoted to supporting or defeating a particular candidate—but yet are not reportable—are the predominant feature of the

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[9] Contrary to Respondent's contention, Petitioners did not, and do not, assert that the cases meet the requirements for a formal consolidation, or that they should be consolidated.

election finance landscape. Contrary to Respondent's contention, the boundaries of express advocacy as defined by the Fifth Circuit are not "settled law." This case presents an issue of national importance to the states upon which there is a pressing need for clarification and guidance from this Court. Review is warranted and Petitioners pray that it will be granted.

Respectfully submitted,

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